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United States. Supreme Court

REPORTS

OF

CASES ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

DECEMBER TERM, 1850.

By BENJAMIN C. HOWARD,

COUNSELLOR AT LAW AND REPORTER OF THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

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SUPREME COURT OF THE UNITED STATES.

HON. ROGER B. TANEY, Chief Justice.
HON. JOHN McLEAN, Associate Justice.
HON. JAMES M. WAYNE, Associate Justice.
HON. JOHN CATRON, Associate Justice.
HON. JOHN McKINLEY, Associate Justice.
HON. PETER V. DANIEL, Associate Justice.
HON. SAMUEL NELSON, Associate Justice.
HON. LEVI WOODBURY, Associate Justice.
HON. ROBERT C. GRIER, Associate Justice.

JOHN J. CRITTENDEN, ESQ., Attorney-General.

WILLIAM THOMAS CARROLL, ESQ., Clerk.

BENJAMIN C. HOWARD, ESQ., Reporter.

RICHARD WALLACH, ESQ., Marshal.

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NOTE.

The Reporter, being absent from Court during the whole month of December, 1850, requested the friendly aid of A. H. Lawrence, Esq.; and having obtained the sanction of the Court thereto, now takes pleasure in expressing his obligations to that gentleman for his assistance in preparing the reports of the cases which were argued during that month.

THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

AT

DECEMBER TERM, 1850.

SIMON GRATZ'S EXECUTORS AND OTHERS, APPELLANTS, *v.* SAMUEL M. COHEN AND ELEAZER L. COHEN.

Where a deed was executed by an aged woman, the sole surviving executrix of her father, with power under the will to sell, with a view to put an end to a long family litigation in which some judgments had been obtained, and other suits were then existing, and who owned the whole or nearly the whole of the residuary interest of the estate; and the settlement was made with deliberation, and under advice of business friends, and the consideration of the deed was a sum of money in hand, with a stipulation on the part of the grantee, that he would pay over any surplus which the lands might yield after paying all reasonable expenses and legal claims, — this deed cannot be set aside on the ground of fraud.

The bill below must be dismissed, unless it be so amended as to include all the parties interested, and be confined to a claim for the surplus of the proceeds of the lands, after paying reasonable expenses and legal claims.

THIS was an appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania, sitting as a court of equity.

It was a bill filed in 1839, by Samuel and Eleazer L. Cohen, citizens of the State of New Jersey, against Simon Gratz, Leah Phillips, and twelve other persons. It was a bill for a discovery against Leah Phillips, surviving executrix of Joseph Simon deceased, and Simon Gratz, and praying also that a certain agreement and deeds executed by and between said Leah and Simon might be annulled, and declared fraudulent and void, and that Simon Gratz be decreed to account, &c.

The bill involved the consideration of matters and accounts, commencing in 1769, and continuing down to the time when it was filed. It was a family dispute which had been carried on in the courts of Pennsylvania for a number of years, and reported as follows: — Gratz *v.* Phillips, 1 Binney, 588 (1809); Gratz *v.* Simon, 3 Binney, 474 (1811); Gratz *v.* Simon, 5

Binney, 564 (1813); Gratz *v.* Phillips, 14 Serg. & Rawle, 144 (1827); Gratz *v.* Phillips et al., 1 Pa. Rep. 333 (1831); Gratz *v.* Phillips, 2 Pa. Rep. 410 (1831); Simon's Executors *v.* Gratz, 2 Pa. Rep. 412 (1831); Cohen's Appeal, 2 Watts, 175 (1834).

This narrative need not go further back than 1804, when Joseph Simon, a merchant or trader, and resident of Lancaster, died. Besides other children, whose interests were not involved in this controversy, he had three daughters, Miriam, Beliah, and Leah. They were all married. Miriam was married to Michael Gratz, Beliah to Solomon M. Cohen, and Leah to Levi Phillips. Simon Gratz, whose executors were the appellants, was one of the children of Miriam and Michael Gratz. The complainants below and appellees here, were the children of Beliah Cohen. At the time of Mr. Simon's death, there were unsettled partnership transactions between him and his son-in-law Michael Gratz, and a large body of lands was held by them in common. Suits were then pending between them relative to these transactions.

By the will of Joseph Simon, 26th October, 1799, he disposed of the bulk of his estate as follows.

Art. 14. He ordered and directed that the whole residue of his estate (to be invested in certain stocks) should be divided into three equal shares, and one part of the proceeds thereof, that is the interest, should be paid to his daughter Miriam during her life; one third part of the proceeds or interest thereof to his son-in-law Levi Phillips and Leah his wife, during their joint lives and the life of the survivor of them; and the remaining third part to his daughter Beliah during her life.

On the death of either daughter, her share of the principal to vest in her issue, to take as purchasers and tenants in common. On the death of either Miriam or Leah without issue, the share to be divided among the children of Beliah Cohen.

By Art. 16, Mr. Simon made the devise to Mrs. Gratz (Miriam) dependent on a release of certain lawsuits then pending, and in the event of no such release he gave her share to Mrs. Cohen and Mrs. Phillips.

Of this will, he made his son-in-law Levi Phillips, and his daughters Mrs. Phillips and Mrs. Cohen, executors, with full power to sell real as well as personal estate.

By a codicil in December, 1802, he expressly revoked the devise to Mrs. Gratz, and directed the devise to Mrs. Phillips to be absolutely one half of the principal of the residue; the legacy to Mrs. Cohen to be as before, — the interest on her share.

By a second codicil, 9th February, 1803, he provided as follows: —

"Whereas, my son-in-law Levi Phillips has continually in-

formed me that, when I had made the last codicil in my last will and testament, I ought also at the same time to have made the alteration by giving my daughter Beliah her share in the principal, instead of the interest of the principal of my residue, which would make her more comfortable; therefore I do, by this instrument of writing, authorize and give full power to my son-in-law, Levi Phillips, as being one of my executors and guardians of my last will and testament, to do as he thinks requisite, — that is to say, by giving my said daughter Beliah her share of my residue in the principal as the money comes to hand.

"In witness whereof, I, Joseph Simon, have this day set my hand and seal.

"JOSEPH SIMON.

"*Lancaster, February* 9, 1803."

Levi Phillips, Leah Phillips, and Beliah Cohen all acted as executors.

In 1807, Michael Gratz brought a suit against the executors, and from that time the parties were continually in some court.

After the death of Simon, his executors proceeded to sell and dispose of his lands, from time to time, under the powers vested in them. In a large number of these tracts of land, Michael Gratz was interested, by virtue of a declaration of trust given by Simon in his lifetime, and of claims of David Franks (a former partner of Simon), which had been transferred to Michael Gratz; Simon Gratz was the agent of Michael Gratz in his lifetime, and his chief acting administrator after his death.

In September, 1811, Michael Gratz died, and although letters of administration were granted to Simon in conjunction with other persons, yet he was the chief acting administrator, and appeared to transact all the business.

It is not necessary to trace the progress of the various suits mentioned in the commencement of this narrative. In 1832, Levi Phillips died, and on the 29th of January, 1833, Beliah Cohen died, leaving Leah Phillips the sole surviving executrix of her father, Joseph Simon.

On the 15th of February, 1833, the agreement was entered into between Leah Phillips and Simon Gratz, which it was the object of this bill to set aside as fraudulent.

The circumstances attending the making of this agreement are thus stated in the bill: —

"Your orators further show unto your honors, that Solomon M. Cohen, their father, died in the month of February, 1796, and that Beliah Cohen, their mother, died on the 29th day of

January, 1833, and that they, and their brothers and sisters heretofore named, are the persons mentioned as the children of his daughter Beliah in the last will and testament of Joseph Simon; that the papers of the estate of the said Joseph Simon were in the possession of Levi Phillips at the time of his death; that the said Levi Phillips died on the 15th day of January, 1832, and that after his death the papers of the said estate were in the possession of the said Leah Phillips, one of the executors of the said Joseph Simon; that during the year 1832, secret interviews took place between Simon Gratz and Leah Phillips, executrix, citizens of the Commonwealth of Pennsylvania, with the view of depriving your orators, and the other children of the said Beliah Cohen, of their just rights under the will of the said Joseph Simon, which said interviews were concealed from the said Beliah Cohen and her family; and your orators believe, and expressly charge, that John Moss, Isaac Phillips, Lyon J. Levy, and Isaac B. Phillips, citizens of the Commonwealth of Pennsylvania, were, during that year and afterwards, aiding and assisting the said Simon Gratz and Leah Phillips in their design to appropriate the estate of the said Joseph Simon to the said Simon Gratz and Leah Phillips, and deprive your orators, and their brothers and sisters, of the said estate and of their just rights. That shortly after the decease of their mother a fraudulent agreement was made and entered into between Simon Gratz and Leah Phillips, dated February 15th, 1833, a copy whereof, marked H, is hereto annexed, and which your orators pray may be taken as part of their bill; the object of which said agreement was fraudulently to terminate the suits then pending between the surviving executrix of the said Joseph Simon and the administrators of Michael Gratz, by agreeing, consenting to, and causing judgments to be taken against the estate of the said Joseph Simon, to the manifest injury of your orators, and their brothers and sisters hereinbefore named, interested as aforesaid in the said estate; and the further object, purpose, and intention of the said agreement was fraudulently to convey, or cause to be conveyed, to the said Simon Gratz all the real estate of the said Joseph Simon, which said real estate is more particularly set forth in a schedule hereto annexed, marked L, for a consideration entirely inadequate, and known so to be by the said Simon Gratz and Leah Phillips, and to transfer, without an adequate consideration, to the said Simon Gratz the debts due to the estate of the said Joseph Simon; and that the said Leah Phillips and Simon Gratz, then well knowing the unjust and fraudulent character of said agreement and the inadequacy of the consideration, did combine and con-

federate with others, their confederates, to defraud your orators, and their brothers and sisters, of their just interest in the estate of the said Joseph Simon. And your orators further show to your honors, that the said agreement was concealed from your orators and the other children of the said Beliah Cohen, and was first discovered by them on the 13th day of June, 1833, it having been produced on that day by Lyon J. Levy, one of the confederates, in an examination of the said Lyon J. Levy, as a witness before Michael W. Ash, Esquire, an alderman of the city of Philadelphia, the said Lyon J. Levy having been subpœnaed for the purpose of having his deposition taken in a case then pending in the Orphan's Court of Lancaster County; that the first knowledge your orators, and, as they verily believe, any of the children of the said Beliah Cohen, had of an arrangement having been made between Simon Gratz and Leah Phillips, was obtained by one of their brothers, Joseph S. Cohen, who, on the 23d day of March, 1833, was informed by Benjamin Champneys, Esquire, who had been and was counsel for the estate of Joseph Simon, that he, the said Benjamin Champneys, had received from Leah Phillips a power or warrant of attorney to enter judgment for the plaintiffs in a suit then pending, and on the argument list of the Court of Common Pleas of Lancaster County, between Gratz's Administrators, plaintiffs, and Simon's Executors, defendants, the copy of the record whereof is hereunto annexed. That the said Benjamin Champneys refused to show the said power or warrant to the said Joseph S. Cohen; that on the morning of the 25th of March, 1833, the day fixed for hearing arguments in the said Court of Common Pleas of Lancaster County, the said Joseph S. Cohen attended with his counsel, James Hopkins, Esquire, and Reah Frazer, Esquire, at the opening of the court, and filed the affidavit, a copy whereof, marked I, is hereto annexed; and on motion of Mr. Hopkins, the said court, after considerable resistance on the part of John R. Montgomery and William Morris, Esquires, counsel of Simon Gratz, granted a rule to show cause why Sarah M. Cohen and others, children of the said Beliah Cohen, and interested in the estate of the said Joseph Simon, should not be permitted to come in and take defence in the said action, as appears by the said rule, a copy whereof is hereto annexed, marked J, which raid rule was duly served on the said Leah Phillips, surviving executrix.

"Your orators further show to your honors, that in pursuance of the said fraudulent and secret agreement, dated the 15th day of February, 1833, entered into between the said Leah Phillips and Simon Gratz at the instance of the said John Moss, Lyon

J. Levy, and others, their confederates, who, when discovered, your orators pray may be made parties to this their bill, with apt and sufficient words to charge them; the said Leah Phillips, surviving executrix as aforesaid, afterwards delivered to the said Lyon J. Levy the books and papers belonging to the estate of the said Joseph Simon," &c.

The answer of Leah Phillips to this part of the bill was as follows:—

"And this defendant further answering saith, that in the year 1832, she being of a very advanced age, being then in her sixty-ninth year, of infirm health, almost totally blind, and in very necessitous circumstances, was determined by the advice of her friends, Isaac B. Phillips, John Moss, and Lyon J. Levy, to make a settlement of long pending controversies between the estate of Joseph Simon, of which she was the surviving representative, and of Michael Gratz, which she believed to be represented by the said Simon Gratz, and also to make sale of such lands vested in her under the will of said Joseph Simon as the said Simon Gratz might be willing to purchase. The defendant says, that her object in proposing the arrangement was to terminate controversies which she was unwilling and unable to carry on, and to obtain such a sum of money as would relieve her from embarrassment, which gave her great uneasiness; the said defendant then and still believes, that in making this arrangement she prejudiced the rights of no one, but did what the law gave her perfect authority to do; and this defendant answering says, that in the month of October, 1832, she addressed several notes to said Simon Gratz, desiring to confer with him on the proposed arrangement and purchase, and that she had several interviews with him at her own house, and at his counting-house, and that she entered into an agreement with him, the said Simon Gratz, in order to terminate the pending suits above referred to, and made a conveyance of certain lands to the said Simon Gratz, receiving therefor the sum of fifteen hundred dollars, which was duly paid on and after the execution of the said conveyance and agreement.

"And this defendant further answering saith, that, with a view to carry such conveyance into full effect, she deposited with Lyon J. Levy a trunk of papers, being the same which Joseph S. Cohen had as aforesaid fully examined, and from which he had selected certain papers in order that the said Simon Gratz should examine the same, and take therefrom such papers as muniments of title as might be necessary to carry into full effect the said conveyance; that after the said

trunk had remained some time in the said Levy's possession, it was returned, and is now in the defendant's possession.

"And this defendant further answering saith, that she admits it to be true that Levi Phillips, one of the executors of Joseph Simon, did die on or about the 15th of January, 1832, and that Beliah Cohen, an executrix of Joseph Simon, did depart this life on or about the 29th day of January, 1833.

"And the defendant further answering saith, that there were no other negotiations between this defendant and Simon Gratz, during the life of Beliah Cohen or afterwards, than those already stated; that they had for their object the final termination of controversies between the estate of Michael Gratz and that of Joseph Simon, which this defendant was neither able nor willing to continue, and the conveyance of certain lands for an adequate consideration to be paid by the said Simon Gratz to this defendant as above stated.

"That the negotiations between this defendant and the said Simon Gratz were verbal, and took place partially at his counting-house and partially at her house; that this defendant is unable, at this time, more precisely to state what conversation passed between her and the said Simon Gratz, nor has she copies of any papers which were executed; that there were executed an agreement for the termination of certain pending suits, and two deeds of certain lands in Columbia and Lancaster Counties; that no persons took part in such negotiations but herself and Simon Gratz, and that these negotiations were not concealed from Beliah Cohen or her children.

"And the defendant further answering saith, that Simon Gratz did call on this defendant at her house, in Arch Street, on two occasions, once at the time of the execution of the deeds, and once previously, though the precise period of the first call this defendant is unable to state; that this first call was not made in consequence of any previous notice; that Elkalah M. Cohen was at this defendant's house when Simon Gratz called; that Simon Gratz did not then disclose the object of his call; that he did not state he was not aware that this defendant resided there; that he had not before called there, and this defendant is not aware from whom he received information where she resided.

"And this defendant further answering saith, that there were other interviews between the defendant and Simon Gratz, but whether there were more than two, and whether they occurred before or after the death of Mrs. Beliah Cohen, this defendant is unable to state; this defendant had several interviews with Simon Gratz at his counting-house, and the object of this defendant in going to Mr. Gratz's counting-house was to relieve

him of as much trouble as possible, in a matter in which this defendant then believed, and still believes, he was doing her a kindness.

"And this defendant further answering saith, that she has no recollection of ever stating to Elkalah M. Cohen, when Simon Gratz called on her, that she, the defendant, had no idea of seeing Simon Gratz, and was as much surprised at his calling on her as Miss Cohen could possibly be; nor has she any recollection of any private interview between herself and John Moss, at any time when Elkalah M. Cohen was at this defendant's; nor is she able to say how soon after the death of Beliah Cohen this defendant had an interview with Simon Gratz; nor more particularly to state what passed at that or any other interview than she has already stated.

"And this defendant further answering saith, that five hundred and fifty dollars, part of the consideration of the said agreement and conveyance, were paid to this defendant by L. J. Levy and the rest by Simon Gratz; and that the total amount of said consideration was agreed upon by and between this defendant and Simon Gratz; and that there was no other consideration of the same than the said sum of fifteen hundred dollars," &c.

The agreement itself thus entered into was as follows:—

"Acts to be performed by Mrs. Leah Phillips, surviving executrix of Joseph Simon, deceased:—

"1. To execute deed for Michael Gratz's interest in unsold lands.

"2. To direct her attorney in suit, (in the Court of Common Pleas of Lancaster County, of January term, 1822,) No. 163,—Simon Gratz, Joseph Gratz, and Jacob Gratz, Administrators of Michael Gratz, deceased, *v.* Levi Phillips, Leah Phillips, and Beliah Cohen, Executors of Joseph Simon, deceased.—Amicable action, August term, 1822, award of referees in favor of plaintiffs for $2,967.34,—to bring up the case on agreement, then permit the exceptions to be overruled, and the award affirmed.

"3. To settle the sum due on the sale of house and lots in Carlisle, in judgment in Supreme Court, which shall be submitted to the auditors to report thereon.

"4. In the suit, Levi Phillips, Leah Phillips, and Beliah Cohen, Executors of Joseph Simon, deceased, *v.* Simon Gratz, Joseph Gratz, and Jacob Gratz, Administrators of Michael Gratz, deceased.—In the court of Lancaster County, September term, 1828. No. 2.—Mrs. Phillips and her attorney to direct discontinuance of the action.

"5. To transfer all her interest in the estate of Joseph Simon to Simon Gratz for the sum of $ (this blank amount to be fixed); if the product of this shall produce a sum exceeding the amount of the above judgments, and the sum to be paid as a consideration, then the excess to be paid over to Mrs. Leah Phillips.

"The blank to be filled up with fifteen hundred dollars; five hundred dollars in hand, five hundred dollars in one year, and five hundred dollars in two years.

"S. GRATZ.

"*February* 15, 1833."

In the subsequent part of 1833, when the heirs of Beliah Cohen acquired a knowledge of this transaction, they applied to the State court in the county where the letters testamentary of J. Simon's estate had been granted, to dismiss Mrs. Phillips from her trust as executrix. But the court refused to do so, and she continued to be executrix as long as she lived.

In January, 1839, as has been already stated, the complainants filed their bill. They were two of the children and heirs of Beliah Cohen; the other children were citizens of Pennsylvania, and were made defendants.

After the filing of the bill, but before answer, Simon Gratz died, and after putting in her answer, Leah Phillips died also; and their respective representatives were made parties by bills of revivor.

The bill claimed to set aside the agreement and the deeds made to Simon Gratz, or, if the court would not grant them that remedy because the lands had passed into the hands of *bonâ fide* purchasers from Gratz, then that Gratz should be decreed to account for the value of them. The agreement and the deeds made in pursuance of it were alleged to be fraudulent on two grounds;—

1st. As between the parties themselves, because advantage was taken of the necessities, weakness, and ignorance of an old woman, to obtain a transfer of the whole estate confided to her charge, for a consideration wholly inadequate, upon an agreement approved by her friends, to sell no more than her own interest.

2d. As against the children of Beliah Cohen, because the purchaser colluded with the executrix or trustee in making a fraudulent application of the trust property to her own use, and to pay a judgment in favor of the purchaser, to the payment of which the complainants and their property were not bound to contribute.

The defendants all having answered, and a general replica-

tion having been filed, much evidence was taken upon points which it is not necessary to specify. Amongst other proceedings was an issue at law to determine the value of the lands.

In October, 1847, the cause came on for argument before the Circuit Court, which decreed in favor of the complainants, and that the executors of Simon Gratz should pay to the children of Beliah Cohen the one half of what Gratz had sold the lands for, and convey a moiety of the unsold part. Reference was made to a master to state an account, &c. Exceptions were taken to the report of the master, some of which were sustained and others overruled. The final decree of the court was as follows: —

"That the said Louisa Gratz, Edward Gratz, David Gratz, and Isaac Prince, executors of the last will and testament of Simon Gratz, deceased, do account and pay to Samuel M. Cohen, Eleazer L. Cohen, Sarah M. Cohen, Rachel M. Cohen, Elkalah M. Cohen, Abraham M. Cohen, Joseph S. Cohen, and Joseph S. Cohen, administrator of Rebecca M. Cohen, deceased, children of Beliah Cohen, deceased, the sum of $9,415.29, with interest thereon from October 14, 1847, and costs; and that the said executors shall convey, by proper and sufficient assurances in law, the one moiety of the interest of Joseph Simon in all that certain tract of land designated in the deed of the 3d of April, 1833, from Leah Phillips to Simon Gratz by the warranty name of Samuel Laird.

"Master's costs, $100, to follow the decree. Order for payment accordingly, 29th January, 1848."

The defendants appealed to this court.

The cause was argued by *Mr. Reed* and *Mr. Clarkson*, for the appellants, and *Mr. Dallas* and *Mr. Budd*, for the appellees.

The counsel for the appellants made the following points: —

I. There is no such evidence of fraud on the part either of the executrix, Mrs. Phillips, in making the sale of the lands, or of Mr. Gratz in purchasing, as will authorize the rescission of the contract.

II. The appellees, children of Mrs. Cohen, are in no way injured by the agreement between Mr. Gratz and Mrs. Phillips, their interest either as heirs of their mother, or under the will of Mr. Simon, being more than absorbed by the judgment of $7,916, and the debt of Mrs. Cohen ($6,500) as executrix to her father's estate.

III. That Beliah Cohen, under the last codicil to Joseph Simon's will, took an absolute estate, and not an estate for life, and Levi Phillips was a trustee for her. Such is the plain

meaning of the words of the codicil. "A power which, by the will, the party is required to execute as a duty, makes him a trustee for the exercise of it, and allows no discretion whether he will exercise it or not. The court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances to disappoint the interest of those for whose benefit he is to execute it." Brown *v.* Higgs, 8 Ves. 574; 1 Story's Equity, § 98; 2 Ib. § 1068; Lindenberger *v.* Matlack, 4 Wash. C. C. R. 278; Coates's Appeal, 2 Barr, Penn. State Rep. 129. If Beliah Cohen had an absolute estate, then debts and judgments against her bound it, and the learned judge erred in saying that was a misapplication of trust funds. It was an application of funds not belonging to Beliah Cohen's children.

IV. The proceeds of the lands which the appellees seek to recover, if they exceeded the amount of the judgment referred to in the acts to be performed, are liable to a claim on the part of the representatives of Mrs. Phillips, if to any body. The appellees do not claim under her.

V. This is a stale demand for the interference of a court of equity, which will not be favored. In 1833, when this alleged fraud was discovered, and the plaintiffs below sought redress in the State courts, Simon Gratz, the only individual acquainted with the details of these perplexed transactions, was in full life and vigor. In 1839, when the bill was filed, he was on his death-bed, and died in July, 1839. For five years and eleven months the plaintiffs slept on their rights. In a month the statute of Pennsylvania would have barred the claim by express limitation. Where an application is made for the interposition of this court, and there has been laches, it is not necessary that the actual limitation fixed by the statute should apply. This is well settled. Cholmondeley *v.* Clinton, 2 Jac. & Walk. 141: "At all times courts of equity have, upon general principles of their own, even where there was no statutable bar, refused relief to stale demands where the party has slept upon his rights"; cited with approval, Miller *v.* M'Intyre, 6 Peters, 66. It is a simple question, says Judge McLean, "Has the party slept on his rights?" Coalson *v.* Walton, 9 Peters, 83.

The doctrine that lapse of time may be used as a defence in equity, is far more favored than formerly. When the party is dead, probably his clerks and agents also dead, there being no one who can give any explanation of a paper, or show how it was prepared, and under what circumstances, this doctrine is especially favored. White *v.* Parnther, 1 Knapp (Privy Council), 226.

It is a most important element where a party sought to be affected has been allowed to die, and executors are made parties who have no knowledge of the original transaction. Ellison *v.* Moffat, 1 Johns. Ch. 47.

This doctrine is applicable to cases where fraud is charged; Prescott *v.* Hubbell, 1 Hill, Ch. 213; and this where the party charged is considered, as in this case, a trustee by operation of law, though it might not be as between a direct trustee and his *cestui que trust.* Decouche *v.* Savetier, 3 Johns. Ch. 190. Where a party is chargeable with laches to the extent of the statute of limitations, he must state in his bill that the discovery of the fraud was within the limitation. 1 Hill, Ch. 214.

In Carr *v.* Chapman, 5 Leigh, 185, Lord Camden's doctrine in Smith *v.* Clay, 3 Bro. Ch. 640, was cited with approval: "Nothing can call this court into action but conscience, good faith, and reasonable diligence; when this is wanting, this court is always passive"; and it is on these principles courts of equity, though they have adopted, are not tied down by, statutes of limitation. A shorter period of time, accompanied by gross negligence and acts of abandonment by those having an interest and competent to assert their rights, will bring their case within Lord Camden's principles. If the court saw that it was called on to do injustice, it would not move, however strong in point of original right the claim might be. So in Wagner *v.* Baird, 7 Howard, 234; and Bowman *v.* Wathen, 1 Howard, 189.

In McKnight *v.* Taylor, 1 Howard, 168, the statute of limitations was, as here, within a few months of coming into operation, yet plaintiffs were concluded by laches; there must be reasonable diligence to call into action the power of this court. There is difficulty which the law recognizes in doing justice, when the original transaction has become obscure and evidence may be lost.

To the same effect are Piatt *v.* Vattier, 9 Peters, 416, and Philips *v.* Belden, 2 Edw. 1. Equity gives effect to relatively short lapse of time, discouraging claims not promptly made, especially where there is no personal disability or other impediment.

No court has been more emphatic in its language favoring lapse of time than this court. Prevost *v.* Gratz, 6 Wheaton, 481: "Length of time necessarily obscures all human evidence, and it thus removes from the parties all immediate means to verify the nature of the original transaction; it operates by way of presumption in favor of innocence and against any imputation of fraud. Fraud or breach of trust ought not to be lightly imputed to the living, for the legal presumption is the other

way; and as to the dead, who are not here to answer for themselves, it would be the height of injustice and cruelty to disturb their ashes and violate the sanctity of the grave, unless the evidence be clear beyond a reasonable doubt." Also to the same effect, and that laches or lapse of time may be resorted to as a defence on the evidence without being pleaded, Giles *v.* Baremore, 5 Johns. Ch. 550; Baker *v.* Biddle, 1 Baldwin, 417.

For the general doctrine as to stale demands in equity, and the effect of parties not promptly asserting their rights, see Salsbury *v.* Bagott, 2 Swanst. 613; Beckford *v.* Wade, 17 Ves. 97; Andrew *v.* Wrigley, 4 Bro. Ch. 125; Brown *v.* Deloraine, 3 Bro. Ch. 639; Hovenden *v.* Annesley, 2 Sch. & Lef. 629; Hercy *v.* Dinwoody, 4 Bro. Ch. 268; Wych *v.* East India Co., 3 P. Wms. 309; Pickering *v.* Lord Stamford, 2 Ves. 582; Christophers *v.* Sparke, 2 Jac. & Walk. 223.

As a rule, the statute of limitations does not operate in cases of trust or fraud, but as soon as fraud is discovered it begins to rise. Wamberzee *v.* Kennedy, 4 Desaus. 479.

In Veazie *v.* Williams, 3 Story, 629, there were five years and a half between the sale alleged to be fraudulent and the filing of the bill to avoid it, and the court held the lapse of time to be a bar, because by time the evidence as to the original transaction had been obscured. A court of equity should never be active in granting relief where the circumstances are of such a nature as that it may become the instrument of as much injustice as it seeks to redress. To the same effect, Gould *v.* Gould, 3 Story, 516.

The circumstances from which the laches in this case are deduced are very flagrant. Five years and eleven months were allowed to elapse after the discovery of the alleged fraud.

If the judgment of $7,916, in favor of Gratz's Administrators *v.* Simon's Executors, was a lien on the real estate, the Cohens waited till that lien had expired, which it did in five years, or 1838. They never charged a fraud whilst Simon Gratz was in life and health.

The first allegation of the plaintiffs is in J. S. Cohen's affidavit at Lancaster, 25th March, 1833, within a month of the date of the agreement. In this there is no averment of fraud in either Leah Phillips or Simon Gratz. The most is an implication of such fraud.

In the letter of the Cohen family to the administrator of Michael Gratz, dated 29th March, 1833, the same guarded and doubtful phraseology is used, but there is no averment of fraud. So in the affidavit of 8th April, 1833.

In the affidavit of J. S. Cohen, of 29th July, 1833, no fraud is charged, the strongest word being "collusion."

No averment of fraud was made till this bill was filed in January, 1839; and then, as above stated, Simon Gratz was ill, and he died before his answer could be prepared. It will be remembered that the insinuations of collusion in these affidavits were promptly met by counter-affidavits from Leah Phillips, to which, as well as to her answer, the court are particularly referred.

Of this gross laches of nearly six years, the learned judge took no other notice than in saying, that it was to be lamented that Mr. Gratz died before his answer was prepared. In this omission it is submitted that he erred. The deposition of Mr. Gratz is no equivalent to an answer to the various and specific allegations of the plaintiffs' bill.

Had the plaintiffs interposed at once on the discovery of the imputed fraud, or at any time short of six years, or for five years and eleven months, the lands would not have been sold. The plaintiffs lay by till the lien of the judgment was gone, and the lands disposed of at great trouble and by great effort, for it is manifest that nothing but the greatest exertion and constant supervision by Mr. Gratz and his agents could have disposed of them to even moderate advantage.

The argument of the counsel for the appellees consisted chiefly in an examination of the evidence, to show that the decree of the Circuit Court was correct. A great part of this testimony has been necessarily omitted in the statement of the case, and the argument drawn from it cannot therefore be condensed. The authorities cited by the counsel were the following.

Simon Gratz was not a *bonâ fide* purchaser without notice of his grantor's breach of trust, and his representatives were rightfully decreed by the court to be trustees for the benefit of the Cohens, and charged with the value of the lands so wrongfully obtained.

"Courts of equity will decree a trust *in invitum* against a party who purchases trust property in violation of the objects of the trust, and will force the trust upon the conscience of the guilty party, and compel him to hold the property subject to it in the same manner as the trustees held it." 1 Story's Equity, 395–405.

Scott *v.* Tyler, 2 Dickens, 725: "If one concerts with an executor or legatees, by obtaining the testator's effects at a nominal price, or at a fraudulent undervalue, or by applying the real estate to the purchase of other subjects for his own behoof, or in extinguishing the private debt of the executor, or in any other manner, contrary to the duty of the office of the executor,

such concert will involve the seeming purchaser, or his pawnee, and make him liable for the full value." 2 Story's Equity, § 1257.

Hill *v.* Simpson, 7 Ves. jr. 152: "Transfer by an executor, a clear misapplication of assets immediately after the death, to secure a debt of the executor and future advances, under circumstances of gross negligence, though not direct fraud, set aside by general legatees."

M'Leod *v.* Drummond, 17 Ves. jr. 169. Lord Eldon concurs in the opinion expressed by the Master of the Rolls, in Hill *v.* Simpson, that a general pecuniary or residuary legatee had the right to follow the assets. 1 Story's Equity, 424.

Wormley *v.* Wormley, 8 Wheat. 421: "Wherever the purchaser is affected with notice of facts, which in law constitute a breach of trust, the sale is void as to him, and a mere general denial of all knowledge of fraud will not avail him, if the transaction is such as a court of equity cannot sanction." See also Mechanics' Bank *v.* Seaton, 1 Peters, 309.

The appellants' allegation of laches is not sustained by the evidence, nor do their authorities justify the use to which they are applied. A comparison between the facts of this case and those of the decisions referred to, will show that the lapse of time which prevented the interposition of courts of equity far exceeded that which is here the ground of complaint, and did not admit of the explanations which excuse the comparatively brief delay in the complainants in seeking a redress for their wrongs in a federal court.

An examination of the following leading cases, cited by the appellants, will show what the courts have considered as stale claims.

In Prevost *v.* Gratz, 6 Wheat. 481, it was determined that the lapse of forty years, and the death of all the original parties, was sufficient to presume the discharge and extinguishment of a trust proved once to have existed by strong circumstances. This was in analogy to the rule of law, which, after a lapse of time, presumes the payment of a debt, surrender of a deed, and extinguishment of a trust.

Cholmondeley *v.* Clinton, 2 Jac. & Walk. 1. It was held that laches and non-claim by the owner of an equitable estate, under no disability, for *twenty years*, where there has been no fraud, will constitute a bar to equitable relief, by analogy to the statute of limitations.

Miller *v.* M'Intyre, 6 Peters, 65. "At least *twenty-six years*," says Judge McLean, "elapsed after the adverse possession was taken by the defendants, before suit was brought against them by the complainants, and *nineteen* years from the decease of their ancestors."

Coulson *v.* Walton, 9 Peters, 63. Notwithstanding a delay of more than *thirty years* in the institution of the suit, the court did not consider that lapse of time, under the circumstances of the case, should operate against the right set up by the complainants to have the specific execution of a contract decreed.

Baker *v.* Biddle, 1 Baldwin, 419. "The act of limitation," says Judge Baldwin, "has twice run over the plaintiff's claim, and, being barred at law, we can see no equitable circumstances to take it out of the rule."

Piatt *v.* Vattier, 9 Peters, 416. "There has been," say the court, "a clear adverse possession of thirty years without the acknowledgment of any equity or trust estate in Bartle, and no circumstances are stated in the bill, or shown in evidence, which overcome the decisive influence of such an adverse possession."

M'Knight *v.* Taylor, 1 Howard, 167. "In relation to this claim," says Chief Justice Taney, "it appears that *nineteen years and three months* were suffered to elapse, before any application was made for the execution of the trust by which it had been secured. No reason is assigned for this delay; nor is it alleged to have been occasioned in any degree by obstacles thrown in the way of the appellant. As the record stands, it would seem to have been the result of mere negligence and laches."

Gould *v.* Gould, 3 Story, 516. The delay was for nineteen years.

Veazie *v.* Williams, 3 Story, 631, has no analogy to the present case, and was reversed in 8 Howard, 134; there was no fraud imputed to the defendants, and the plaintiff, says Judge Story, (pp. 631, 632,) "is not now at liberty to shift his own loss upon the defendants, or to make them responsible for the misdeeds of Head, to which they were not parties, and whom the plaintiff has been content to release from all responsibility."

Mr. Justice WOODBURY delivered the opinion of the court.

In this case, the plaintiffs in the court below, as children of Solomon and Beliah Cohen, and grandchildren of Joseph Simon, claimed an interest in certain lands which had been conveyed to Simon Gratz by Mrs. Phillips, the surviving executrix of Joseph Simon.

That conveyance was alleged to have been fraudulent, and the plaintiffs prayed that it be set aside, and Simon Gratz be required to account for any sales and rents of the land. The court below decreed that the conveyance was void for fraud; yet, as the lands had been bought of Gratz since by innocent

purchasers, declined to set it aside, but ordered the respondent to pay over the full value of the lands, and without any deduction for debts, advances, or expenses.

This is an appeal from that decision; and in order to determine whether evidence enough exists to show that fraud was practised by either of the parties to the conveyance, as it is charged on both of them, it will be necessary to ascertain how the lands were situated, and the relation to them in which the grantor and grantee, as well as the plaintiffs, then stood.

Some time prior to 1804, Joseph Simon and Michael Gratz purchased in partnership large tracts of land in Pennsylvania, the title deeds running to the former alone, under an agreement to account to the latter for half the proceeds. As sales of them were made from time to time, difficulties and litigation arose between them as to the proceeds, extending even to eight reported cases in the courts of Pennsylvania, and all of which appear to have been decided against Simon.

He complained much that Gratz had obtained from him more than he was entitled to. Accordingly, when Simon made his will and died in 1804, he forbade, by the last codicil, any portion of his estate going to Michael Gratz or his wife Miriam, who was the daughter of Simon, and did not make either of them executors on his estate. But he appointed Levi Phillips and wife, the latter being another daughter, and Mrs. Cohen, a third daughter, executors. At first he bequeathed one third of the income of the residue of his estate to each daughter, but by the codicil increased Mrs. Phillips's and Mrs. Cohen's share each to one half of the principal, and, withdrawing Mrs. Gratz's share, empowered Levi Phillips to give to Mrs. Cohen the principal rather than the interest, or income. At the death of either daughter, her share was to vest in her children, as tenants in common. He gave to his executors, and the survivors of them, full power to sell his real, as well as personal estate.

Some suits between Simon and Michael Gratz in relation to their partnership property were pending at the death of the former; others were soon after brought, and others still, as sales of the land were made by the executors, and recoveries were had in some of them for portions of what Simon and they had sold. By the death of Mr. Phillips in 1832, and of Mrs. Cohen in January, 1833, Mrs. Phillips had become the sole surviving executrix, and she in February, 1833, proposed to Simon Gratz, executor of Michael Gratz, to make a final settlement of the claims on his part against the estate of Joseph Simon. At that time, Simon Gratz held unsatisfied a judgment against Levi Phillips and Mrs. Cohen, which had been recovered in 1831 for $7,916.73.

They had not been called "Executors of Simon" in the declaration, but the subject-matter of the action was connected with his estate, and with the proceeds of sales of the partnership lands.

There was another action pending, which was brought by Gratz's Executors against Simon's Executors, in which an award had been made to Gratz for $2,967, but exceptions had been taken to it, not yet acted on.

At that time, too, Mrs. Cohen had received from Simon's estate, as early as 1812, $1,008, which, with interest to 1833, amounted to near $6,500, and none of it had ever been refunded by her.

In this state of things the inquiry arises, whether, in the proposals by Mrs. Phillips, the negotiation for a settlement, and the conveyance of the lands to Gratz under the conditions and circumstances of the case, fraud is manifest so as to justify the rescinding of that conveyance, or if not, because the land is now in the hands of innocent purchasers from Gratz, to make the latter account for its whole value as if the sale to him had been void. In deciding this question, let us look first to the terms and circumstances of the agreement.

She stipulated, in relation to the suit then pending, to have the exceptions overruled, and the award confirmed for $2,967. She agreed further to discontinue a suit of doubtful merits pending by Simon's Executors against S. Gratz et al., Executors of Michael Gratz, and also as executrix to convey to S. Gratz all the unsold lands of the partnership, and all her own personal interest in Joseph Simon's estate. On the part of S. Gratz, he agreed to pay her $1,500 cash, — though nothing is said in the writing as to the release or discharge of the judgments against Joseph Simon's executors or other claims by S. Gratz; but they thus became virtually discharged, as all the remaining estate of Joseph Simon was then conveyed to S. Gratz. Nothing appears to have been said, likewise, as to the debt due from Mrs. Cohen, but probably that was deemed quite an equivalent to what remained of her share in Simon's estate; and she being dead, this was left as it had stood for twenty years.

On these leading facts, the first ground assigned to show fraud by S. Gratz is a supposed deficiency of consideration for this agreement and the conveyance. But in the family settlement it is proper to look to equitable circumstances, and not to expect all such technical formalities as prevail between strangers. The consideration actually paid in money was $1,500, and though Mrs. Phillips may have regarded it as for her rather than the estate of Simon, yet it made little difference, as she was the only residuary devisee of Simon surviving; and if

Mrs. Cohen had been already paid more than her share, as seems probable, this sum would virtually go to Mrs. Phillips alone, as it would first in form belong to the estate, and then to her as devisee. It was in fact also paid to her for matters connected with the estate, and while she was executrix of the estate, instead of being, as is argued, a personal bribe to her..

Though a technical difference might exist between the executors as to their several liabilities (14 Serg. & Rawle, 152), and though different modes of proceeding might be necessary to enforce them, yet the estate of Simon was the only fund liable. The interest in the partnership lands, which belonged to Michael Gratz, was the only source of all his claims, and the parties properly looked at it in its true equitable light, through all the varnish and varieties of form, and negotiated with a view to the whole.

Thus, if one of these judgments did not describe the defendants as executors, yet the other did, and the first one was founded on the proceeds of sale by them as executors of lands, the title to which had stood in the name of Simon, though a moiety belonged to Michael Gratz, and the executors were acting in trust for Gratz as well as Simon. Now the $1,500 in money, and the $10,000 in the two judgments, with interest, were probably very near the value of the lands as situated in 1833. But to remove all doubt as to the fairness and fulness of the consideration, Simon Gratz further agreed to pay over to Mrs. Phillips any surplus the lands might yield after paying all reasonable expenses and legal claims. This cures every exception to the inadequacy of the consideration.

If the surplus, after an inquiry into the matter, and after allowing to Michael Gratz or his estate and executors all which is just, should be considerable, an administrator of Mrs. Phillips could enforce its payment on this agreement; and the administrator of Mrs. Cohen, instead of being injured or defrauded, could obtain her share, and divide it among her children, the present complainants, if she had not before her death received enough to cover this, as well as former interests or dividends.

It is next said in support of the alleged fraud, that Mrs. Phillips was an aged female, little accustomed to business, and likely to be overreached by so shrewd and capable a man as Simon Gratz. But Mrs. Phillips, though aged, is proved to have been intelligent and capable. She applied to him rather than he to her to make the settlement, and he suggested the advice and aid of her business friends rather than attempting a secret and sudden settlement. She did consult two intelligent business friends. Full time was given to make inquiries and calculations, rather than using haste. Though Mrs. Phillips

did not confer with the plaintiffs, she was not bound to consult the Cohen heirs more than others; and the contract by Simon Gratz to pay over any surplus secured any eventual interest of theirs as fully as they themselves could have done, and wisely put an end to a protracted family litigation, as expensive and ruinous as it was derogatory.

Mrs. Phillips, at her advanced age, being sole representative of Simon's estate, had a good and sufficient motive to be anxious, at the first opportunity after Mrs. Cohen's death, to close that estate up, and the lawsuits and the trusts, and was not likely to do it then, as assumed, because she could then more easily defraud. She could not then, by having the $1,500 paid to herself, deprive the plaintiffs, if she desired, of any share in it they might be entitled to. It was received on account of interests conveyed in the Simon estate.

She was both executrix with a right to sell, and a devisee with a personal interest in the estate of Simon. What she received, then, of Simon Gratz, went to her in both capacities, it being proceeds of Joseph Simon's estate, and worked no injury to Mrs. Cohen's children, as Mrs. Phillips in her character of executrix would be liable to them for their share in what Gratz paid, if they had not already, through Mrs. Cohen, obtained enough to cover this.

Too much importance has, in our view, been attached to the payment being to her, and not repeating the words "*as executrix*," and the recovery of one judgment being against the other executors, without repeating their titles. These mere descriptions, inserted or omitted, cannot, however, in chancery, change the essence of a transaction, when they had nothing to receive, or grant, or account for, except as executors of Joseph Simon, and where the whole matters in controversy are connected with lands, the title of which was nominally in him, but the beneficiary interest in part in Michael Gratz and his executors.

Again, it is urged against the validity of the conveyance, that it included some lands of Simon, in which Michael Gratz had no interest. But Mrs. Phillips, as surviving executrix, had a right under the will to sell any estate of Simon; and there was a good reason for selling the whole on this occasion, in order, at her advanced age, to close up the administration of Simon's estate, as well as to convey enough to Simon Gratz to satisfy his claims on it as executor.

He, too, could manage it better than any female, and instead of taking advantage of her, or any body she represented, he became liable to account for any surplus, if any should occur.

It is further urged, that the wishes of Joseph Simon to dis-

inherit Michael Gratz and his family were thus overcome, and are not to be trifled with.

But the inflexible will of Joseph Simon against Michael Gratz and his family having any portion of his estate was not thwarted in this way, since they received nothing as devisees or heirs, but merely purchased for a valuable consideration what any person in the community had a right to buy, and obtained in the end chiefly land which S. Gratz's ancestor owned and paid for as much as J. Simon.

In fine, we are at a loss to see any strong indications of fraud in any part of this transaction, either by S. Gratz or Mrs. Phillips; and most of what appears, at first, in some degree objectionable, seems reconciled with perfect integrity when we advert to the legal presumptions in favor of those charged with misbehavior, and to the family connection between the parties and the preponderating equities of the case.

These conclusions would not be different, whether the principal of Mrs. Cohen's share was under the last codicil to be considered as vesting in her, or only the interest of it.

Empowering an executor to make a change like that in a bequest is, however, usually regarded as expressing a wish to have it done, if it be not clearly a mere power, and to require that that be considered as done which ought to be done, if forgotten or omitted. Brown *v.* Higgs, 8 Ves. 574; 4 Wash. C. C. 278; 1 Story, Eq. § 98, and 2 Story, Eq. § 1068. Considering what are our views as to the validity of the conveyance, other points and exceptions in this case need not be examined, and especially that connected with the length of time which elapsed after the conveyance to S. Gratz, and before the filing of the present bill to avoid it.

Let the judgment below be reversed, and the case sent back to have the bill dismissed, unless the present parties agree to let others in interest come in, and to reconstruct and alter the character of the bill by amendments, so as to carry the agreement between Mrs. Phillips and Gratz into effect, and pray for the surplus or balance, if any be found due from Gratz, after paying all he has advanced, and all his expenses, and his equitable as well as legal claims on Mrs. Phillips and the estate of Joseph Simon.

Mr. Justice NELSON dissented.

Mr. Justice GRIER did not sit on the trial of this cause, being indisposed at the time.

Order.

This cause came on to be heard on the transcript of the

record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court for further proceedings to be had therein in conformity to the opinion of this court.

THE UNITED STATES, PLAINTIFFS IN ERROR, *v.* JAMES A. GIRAULT, WILLIAM M. GWIN, HAY BATTLE HARRISON, AND ALEXANDER J. McMURTRY.

Where an action was brought by the United States upon the official bond of a receiver of public money, a plea that the United States had accepted another bond from the receiver was bad. The new bond could be no satisfaction for the damages that had accrued for the breach of the condition of the old one.

Pleas, also, were bad, alleging that the receiver had made returns to the Treasury Department, admitting that he had received money which the pleas asserted that he never had received. They were bad, because they addressed themselves entirely to the evidence, which, it was supposed, the United States would bring forward upon the trial.

Besides, these pleas were bad, because the sureties in the bond were bound to protect the United States from the commission of the very fraud which they attempted to set up as a defence.

The case of the United States *v.* Boyd, 5 Howard, 29, examined.

Another plea taking issue upon the breach should not have been demurred to. The demurrer being general as to all the pleas, and bad as to this one, judgment was properly given against the plaintiffs in the court below.

By the laws of Mississippi, where a joint action is brought upon a bond or note, the case must be finally disposed of in the court below, with respect to all the parties upon the record, before it is carried up to the appellate court, otherwise it is error.

Where this error occurs, the practice of this court is to dismiss the case for want of jurisdiction, and remand it to the court below to be proceeded in and finally disposed of.

THIS case was brought up, by writ of error, from the District Court of the United States for the Northern District of Mississippi.

The United States sued out process against James A. Girault, William M. Gwin, Hay Battle Harrison, and Alexander J. McMurtry, and declared for a debt of $100,000 by bond, bearing date the 8th of July, 1838, executed by the defendants to the United States, with condition, reciting that the defendant Girault had been appointed by the President of the United States, by commission bearing date the 2d of June, 1838, receiver of public money for the district of lands subject to sale

at Chocchuma, in the State of Mississippi, that, "if the said Girault shall faithfully execute and discharge the duties of his office, then the obligation to be void"; and assigned for breach, "that on the 2d day of June, 1840, the said Girault, as receiver of public money as aforesaid, had received a large amount of public money, to wit, the sum of $8,952.37, which said sum of money, he, the said James A. Girault, has hitherto wholly neglected and refused, and still neglects and refuses, to pay to the United States, contrary to the form and effect of the said writing obligatory; and of the condition thereof by reason of which," &c.

To this the sureties, Gwin, Harrison, and McMurtry, pleaded (by leave of the court first had) four several pleas.

1. That after the making of the bond declared on, (and after the said 2d of June, 1840, mentioned in the assignment of breach,) and before the commencement of suit, to wit, on the 25th of September, 1840, the said J. A. Girault, and McRae Bartlett, George K. Girault, Wilson and Blocker, made their act and deed to the plaintiffs in the penal sum of $100,000, reciting the appointment of said James A. Girault as receiver of public money at Chocchuma, by commission bearing date the 2d of June, 1838, with condition, "that, if the said James A. Girault had truly and faithfully executed and discharged, and should truly and faithfully continue to execute and discharge, all the duties of said office, according to the laws of the United States," &c., &c.; which bond and condition the plaintiffs did then and there "receive and accept of and from said James A. Girault, ————, in full lieu, discharge, and satisfaction of the said writing obligatory in the plaintiffs' declaration mentioned; and this the said defendants are ready to verify; wherefore they pray judgment if," &c.

2. That on the 2d of June, 1840, and on several days before, "the said James A. Girault issued receipts as receiver of money, paid for certain lands therein specified, and so returned, at the times aforesaid, to the Treasury Department of the United States, to the amount of ten thousand dollars, and of which the amount in the declaration mentioned is part and parcel; and these defendants say, that neither the said ten thousand dollars, nor any part thereof, were ever paid to or collected by him, the said James A. Girault, which these defendants are ready to verify and prove; wherefore they pray judgment if the said plaintiffs shall have their action against them."

3. The third plea says, "that said J. A. Girault caused to be entered for his own use several parcels of land, amounting to eight thousand acres, and gave and issued receipts for money paid therefor on the 2d of June, 1840, and on divers other days

before that time, and returned an account to the Treasury Department of the United States in said receipts specified, to the amount of ten thousand dollars, of which amount the sum mentioned in plaintiffs' declaration is part and parcel." "And the said defendants aver that neither the said moneys, nor any part thereof, were ever paid or deposited in said office by the said Girault, or any one for him, and this the defendants are ready to verify; whereof they pray judgment."

4. The fourth plea alleges that the plaintiffs ought not to have their action, because the defendants say "that no public moneys of the United States came to the hands of the said James A. Girault, as such receiver, after the execution of said bond, nor were there any such public moneys, for the payment of which the defendants were chargeable by virtue of the said bond, received by him prior to the execution of the same, remaining in the hands of the said receiver, in his official capacity, at the time of the execution of said bond, or at any time thereafter, which had not been paid or accounted for according to law, before the commencement of this suit, which the defendants are ready to verify; wherefore they pray judgment," &c.

To these pleas the attorney for the United States demurred.

The court sustained the demurrer to the first plea, overruled it as to the second, third, and fourth; and adjudged that the plaintiffs be barred from having their aforesaid action.

To review this judgment the United States sued out a writ of error, and brought the case up to this court.

It was submitted on printed arguments by *Mr. Crittenden* (Attorney-General), for the United States, and *Mr. Cocke*, for the defendants.

Mr. Crittenden, for the appellants.

As the demurrer brings all the pleadings before the court for judgment, to be rendered for the party who shall, on the whole record, appear to be rightfully entitled to judgment, it is proper to point out the defects in all the pleas of the appellees.

A demurrer admits only such facts as are well pleaded; never admits the law as deduced by the pleader from the facts pleaded, but refers the law to the judgment of the court, and may well be entered for a false allegation of law. U. States *v.* Arnold, 1 Gall. 348.

I. The first plea is ill, for several reasons:—

1. The action is in debt on a bond, and it is not a good plea that the plaintiffs accepted another bond in satisfaction of the old bond, and for the damages upon the breach of the old bond; for that is no satisfaction, actual and present, as it

ought to be. Lovelace *v.* Cocket, Hobart, 68; 4 Bac. Abr. *Pleas and Pleading*, (L) p. 87.

2. The new bond, pleaded with a condition retrospective, with intent to include and cover breaches of duty committed by the receiver, before the date of the new bond, was void as to that, and not binding on the securities; and therefore could not be satisfaction for the bond, and the breaches and damages in the declaration alleged. Armstrong *v.* U. States, Peters, C. C. Rep. 46.

3. The plea alleges a bond by Girault and his sureties, of the 25th of September, 1840, of a character which no officer of the government of the United States had any lawful power or rightful authority to agree to accept, or to accept or receive in lieu or in satisfaction of the said prior lawful bond, debt, and damages, in the declaration mentioned.

4. The said plea does not traverse the bond and condition declared upon, nor the breach alleged in the declaration, but, confessing the said bond, condition, and breach, the plea sets up matters of defence which in law do not amount to any avoidance or sufficient defence of the cause of action in the declaration charged and averred.

5. The plea does not aver to what officer or agent of the government of the United States the said alleged bond of 25th September, 1840, was delivered, nor what officer or agent of the government of the United States agreed to accept said bond in lieu, discharge, and satisfaction of the bond in the declaration mentioned; neither does the plea aver, show, or rely upon any law, authority, or rightful power in any officer, agent, attorney, or minister of the government of the United States, to agree to and accept such accord and satisfaction as is in said plea relied upon and pleaded; neither in point of law had any person competent authority or rightful power, for and on behalf of the government of the United States, to agree to and accept any such accord and satisfaction as in said plea is supposed and alleged.

II. and III. The second and third pleas are ill; they allege acts done and committed by the officer Girault, which were in violation of the duties of his office, in direct breach of the condition of his official bond mentioned in the declaration; which acts, so alleged by the pleas, rendered the officer Girault and his sureties liable to the United States for the amount of money specified in those official receipts and official returns. The pleas allege nothing to exonerate Girault and his sureties from liability to the government for the amount of money specified in those receipts and reports.

The receiver Girault and his sureties are liable to the govern-

ment upon the official receipts and official returns made by the receiver; and whether he did or did not in fact receive the money before he issued his receipts, and made his official returns thereof, is immaterial. He is chargeable, and so are his sureties, upon his official receipts and returns, because those receipts issued and those returns entitled the persons to whom those receipts were given, and their alienees, to patents for the lands mentioned in the receipts as having been paid for.

The receiver and his sureties cannot require of the government to go behind those official receipts and official reports, to prove by evidence *aliunde* that the receiver's receipts and official returns are not false, and that in point of fact he did receive the money.

The receiver and his sureties are estopped by his official receipts and official returns of money received.

The interests of the government in respect of the sale of the public lands would be in a perilous condition, if the government could be required by such pleas as these, No. 2 and 3, to go into an inquiry, by parol proof or evidence *aliundé*, whether the official receipts and official returns of the receivers of public moneys were true or false.

Pleas No. 2 and 3 confess the matters alleged in the declaration, confess the cause of action, without alleging any lawful avoidance.

IV. The fourth plea which is pleaded in bar concludes with a verification, contains no traverse of the matter alleged in the declaration, and is totally illegal and insufficient.

The plaintiffs could have made no other replication to this plea, than by repeating the assignment of breach contained in the declaration.

If the plaintiffs had so replied, still there would have been no issue joined; the defendants might have rejoined by repeating this fourth plea, to which the plaintiffs could have sub-rejoined nothing more than the assignment of breach as first made in the declaration; and so the pleadings might have progressed without end, and without an issue. The plaintiffs were by force of this mode and form of special pleading under the necessity of demurring, so that the insufficiency and illegality of the plea might be judicially determined.

The declaration contains a material, positive averment of matter of facts in breach of the condition of the bond sued on, which material averment is not traversed by the plea, as it should have been, whereby that matter and the cause of action are admitted by the defendants. Toland *v.* Sprague, 12 Pet. 335; Hudson *v.* Jones, 1 Salk. 91; Blake *v.* West et al. 1 Ld. Raym. 504; 4 Bac. Abr., *Pleas and Pleading*, (H.) traverse, pp. 67–83.

This plea is not direct, positive, and single, as required by law, but is uncertain, argumentative, double, multifarious, equivocal, and evasive; it contains a negative pregnant with an affirmative, and an affirmative pregnant with a negative; it is contradictory the one part thereof to another; it first alleges that no moneys came to the hands of Girault as receiver after the execution of the bond sued on; and next alleges argumentatively, that all moneys which came to the hands of the receiver, with which the sureties were chargeable, had been paid or accounted for according to law before the commencement of this suit. If this plea amounts to any defence at all, it is in the beginning a general denial that any moneys had come to the hands of Girault, and in the after part it argumentatively asserts that all the public moneys which came to Girault's hands as receiver had been paid and accounted for before suit; provided, however, that the plea is to be understood as relating only to such moneys as the defendants, the sureties of Girault, were chargeable with by virtue of their bond.

A defendant is not at liberty to plead specially a plea that amounts to the general issue; much less to plead the general issue, argumentatively, with duplicity, and with uncertainty. 4 Bac. Abr., *Pleas and Pleading*, (G,) p. 54; 3 of special pleas, p. 60, (L); 5, p. 97; 6, p. 98.

This plea is framed to let in the matters of pleas No 2 and 3; seems to be intended as a special plea of "*non infregit*," a special plea of "conditions performed," with the qualification annexed, that if the principal, Girault, did break the condition of the bond, or did not perform the condition of the bond, yet they, the sureties, are not bound for the breaches and non-performance. It may properly be denominated "Point-no-Point," which the attorney of the United States could meet in no other way than by a demurrer.

Mr. Cocke, for defendants.

The demurrer admits the truth of the facts severally pleaded.

We hold that it was competent for the United States to contract to receive the bond mentioned in the first plea in lieu and satisfaction of the one sued on, and we are at a loss to perceive upon what principle the court below sustained the demurrer to the first plea.

This court is respectfully requested to bear in mind, that the only breach relied upon in this action is the refusal of Girault to pay over moneys alleged to have been collected and received by him in his official capacity.

By the pleadings in the cause it is admitted, that he did not receive any money; that he issued certificates for land without

payment therefor; and that he had fully paid over and accounted to the treasury of the United States for all moneys received by him officially, prior to the institution of this suit. Which facts constitute, in our opinion, a full bar to this action.

We submit that it is too important to the treasury of the United States for a receiver of a land-office to have power, by fabricated certificates of purchase of public land, to change the title, and, by seeking to charge sureties for the supposed purchase-money, to obtain valid title to any portion of the public domain.

The result in every case would be a total insolvency, and a loss to the government of the money and the land. It is believed that the legislation on the subject does not contemplate the power to make such a disposition of the public lands.

We consider that the principles relied upon in said pleas are well settled in the case of the United States against Boyd and others, 5 Howard's Supreme Court Reports, 29, to which we respectfully refer the court, and on which we confidently rely, and insist that the judgment be affirmed, and the plaintiffs barred of their action. But if, contrary to our expectations, the matters set forth in the second, third, and fourth pleas are not held sufficient to bar the plaintiffs, then we request the consideration and judgment of the court on the sufficiency for such bar in the matters of the first plea.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the District Court held in and for the Northern District of Mississippi.

The action was brought on the official bond of Girault, a receiver of the public money, against him and his sureties. The bond is dated the 8th of July, 1838, and conditioned that he shall faithfully execute and discharge the duties of the office of receiver.

The breach assigned is, that on the 2d of June, 1840, the said Girault had received a large amount of the public moneys, to wit, the sum of $8,952.37, which he had neglected and refused to pay over to the government.

All the defendants were personally served with process.

The sureties appeared and pleaded,—

1. That after the making of the bond in the declaration mentioned, and before the commencement of the suit, to wit, on the 25th of September, 1840, a certain other official bond was given by Girault and others to the plaintiffs, describing it, which they accepted in full discharge and satisfaction of the first one.

2. That on the 2d of June, 1840, and on divers days before that day, the said Girault gave receipts as receiver for moneys

paid on the entry of certain lands therein specified, and returned the same to the Treasury Department, to the amount of ten thousand dollars, and of which the amount in the declaration mentioned was part and parcel. And that neither the ten thousand dollars, nor any part thereof, was paid to or received by him, the said Girault.

3. The same as the second, except that the receipts given were for several parcels of land entered by Girault for his own use.

4. That no public moneys of the United States came to the hands of Girault, as receiver, after the execution of the bond, nor were there any received by him, for which the defendants were accountable by virtue of said bond, prior to the execution of the same, remaining in his hands as such receiver at the time of the execution, or at any time afterwards, which had not been paid over and accounted for according to law before the commencement of the suit.

To these several pleas, the plaintiffs put in a general demurrer, to which there was a joinder.

The court gave judgment for the plaintiffs on the first plea; and for the defendants on the second, third, and fourth. Upon which the plaintiffs bring error

The first plea is not before us, as judgment was rendered for the plaintiffs. It is undoubtedly bad, as the new bond could be no satisfaction for the damages that had accrued for the breach of the condition of the old one. Lovelace *v.* Cocket, Hobart, 68; Bac. Abr., tit. *Pleas*, 2, p. 289.

The second and third pleas are also bad, and the court below erred in giving judgment for the defendants upon them. They are pleas, not to the declaration or breach charged, but to the evidence upon which it is assumed the plaintiffs will rely at the trial, to maintain the action. The breach is general, that the defendant Girault has in his possession eight thousand nine hundred and fifty-two dollars and thirty-seven cents of the public moneys, which he neglects and refuses to pay over.

The defendants answer, that the evidence which the receiver has furnished the plaintiffs of this indebtedness is false and fabricated; and that no part of the sum in question was ever collected or received by him; thereby placing the defence upon the assumption of a fact or facts which may or may not be material in the case, and upon which the plaintiffs may or may not rely in making out the indebtedness. A defendant has no right to anticipate or undertake to control by his pleadings the nature or character of the proof upon which his adversary may think proper to rely in support of his cause of action, nor to ground his defence upon any such proofs. He must deal with

the facts as they are set forth in the declaration; and not with the supposed or presumed evidence of them.

If the defendants are right in the principle sought to be maintained in their second and third pleas, a denial of any public moneys being in the hands of the receiver for which they were liable within the condition of their bond would have answered all their purposes. For if the plaintiffs possess no other evidence of their liability than that of the fabricated receipts, and the sureties are not responsible for the moneys thus acknowledged, nor estopped from controverting them, a plea to the effect above stated would have enabled them to present that defence.

The principle, however, upon which these pleas are founded, is as indefensible as the rule of pleading adopted for the purpose of setting it up.

The condition of the bond is, that Girault shall faithfully execute and discharge the duties of his office as a receiver of the public moneys. The defendants have bound themselves for the fulfilment of these duties; and are, of course, responsible for the very fraud committed upon the government by that officer, which is sought to be set up here in bar of the action on the bond.

As Girault would not be allowed to set up his own fraud for the purpose of disproving the evidence of his indebtedness, we do not see but that, upon the same principle, they should be estopped from setting it up as committed by one for whose fidelity they have become responsible.

This is not like the case of the United States *v.* Boyd and others (5 How. 29). There the receipts which had been returned to the Treasury Department, upon which the indebtedness was founded, and which had been given on entries of the public lands without exacting the money, in fraud of the government, were all given before the execution of the official bond upon which the suit was brought.

The sureties were not, therefore, responsible for the fraud; and it was these transactions on the part of the receiver, which had transpired anterior to the time when the sureties became answerable for the faithful execution of his duties, in respect to which it was held that they could not be estopped by his returns to the government. No part of them fell within the time covered by the official bond.

The fourth plea affords a full and complete answer to the breach assigned in the declaration, and should not have been demurred to. As it takes issue upon the breach, it should have concluded to the country; but this defect is available only by a special demurrer.

As the demurrer put in is general to the four several pleas, if any one of them constituted a good bar to the action, the demurrer is bad. On this ground the judgment was properly given against the plaintiffs in the court below.

They should have asked leave to withdraw the demurrer as to the fourth plea, and have taken issue upon it, instead of allowing the judgment to stand, and bringing it to this court on error.

Indeed, when these pleas were put in, the plaintiffs, in order that the case might be disembarrassed of any technical objections or difficulties on account of the pleadings, should have amended their declaration by assigning additional breaches covering the malfeasance in office set up in the second and third pleas. This would have met the grounds of the defence raised by them, and have presented the issues appropriately upon the condition of the bond, whether or not the receiver had faithfully executed the duties of his office.

The defendant Girault, it appears, was personally served with process, but did not appear. The plaintiffs have not proceeded to judgment, nor discontinued their proceedings, as to him. As the case stands, therefore, there is a joint suit against four defendants on the bond, a judgment in favor of three, and the suit as to the fourth undisposed of.

According to the practice in Mississippi, founded upon a statute of the State, in the case of a joint action on a bond or note, separate judgments may be taken against the several defendants, whether by default or on verdict; and the plaintiff may take judgment against some of the defendants, and discontinue as to others. But it is there deemed error, for which the judgment will be reversed, if final judgment is entered up by the plaintiff before the case is finally disposed of in respect to all the parties on the record. 2 Howard, (Mis.) 870; 4 Ib. 377; 6 Ib. 517; 7 Ib. 304.

In the case in 6 Howard, above cited, the plaintiffs brought a suit against two defendants on a sealed note. The writ was returned served as to one of them, and *non est* as to the other. The declaration was filed against both, and the one personally served appeared and defended; and a verdict was found against him on which judgment was entered, the case remaining undisposed of as to the other defendant. On appeal the court reversed the judgment, remarking that the case should have been disposed of as to all the parties; there is no judgment of discontinuance or dismissal as to one of the defendants.

The same point was ruled in the case in 2 Howard above referred to; and also in that in 7 Howard. In the last case it

is said that it is irregular to enter a final judgment against part of the defendants without disposing of the cause against the others; that it was regular to take judgment by default against those who did not plead; but the judgment in the case should not have been finally entered until the cause was ready for final disposition as to all.

The practice in this court, in case the judgment or decree is not final, is to dismiss the writ of error or appeal for want of jurisdiction, and remand it to the court below to be further proceeded in. 4 Dallas, 22; 3 Wheat. 433; 4 Ib. 75; 6 Howard, 201, 206.

This is also the rule of the King's Bench in England. Metcalfe's case, 11 Co. 38. It is there laid down in the second resolution, that by the words in the writ, *si judicium inde redditum sit*, &c., are intended, not only a judgment in the chief matters in controversy, but also in the whole of them, so that the suit may be at an end. The reason given is, that, if the record should be removed before the whole matter is determined in the court below, there would be a failure of justice, as the King's Bench cannot proceed upon the matters not determined, and upon which no judgment is given, and the whole record must be in the Common Pleas or King's Bench. It is entire, and cannot be in both courts at the same time.

The writ is conditional, and does not authorize the court below to send up the case unless all the matters between all the parties to the record have been finally disposed of. The case is not to be sent up in fragments by a succession of writs of error. Peet *v.* McGraw, 21 Wend. 667.

It is supposed that, inasmuch as judgment is allowed to be entered separately against two or more defendants sued jointly upon a bond or note, according to the statute of Mississippi, the severance of the cause of action is complete; and that any one defendant against whom judgment may be thus entered can bring error, although the case has not been disposed of as to the other defendants. And for a like reason, when a judgment is rendered in favor of one defendant against the plaintiff, the latter may bring error before the suit has been disposed of in respect to the others.

But we have seen that the practice is otherwise under this statute, and that final judgment cannot be properly entered against any of the parties until the whole case is disposed of; and that any neglect in the observance of the rule exposes the judgment to a reversal on error in the appellate court.

According to the practice of this court, the judgment cannot be reversed on account of the error, but the case must be dismissed for want of jurisdiction, and remanded to the court below, to be proceeded in and finally disposed of.

As the case must come before that court for further proceedings, it may, in its discretion, on a proper application, relieve the plaintiffs from the embarrassments in which the justice of it seems to have been involved, on account of the unskilfulness of the pleader, by opening the judgment on the demurrer, and permitting them to amend the pleadings. It is apparent that judgment has been rendered against them, without at all involving the merits of the case.

The writ of error is dismissed, and the cause remanded to the court below.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that this writ of error be, and the same is hereby, dismissed, and that this cause be, and the same is hereby, remanded to the said District Court, with directions to proceed therein in conformity to the opinion of this court.

SAMUEL W. OAKEY, PLAINTIFF IN ERROR, *v.* JOHN H. BENNETT, ADMINISTRATOR OF WILLIAM HALL, AND JOHN H. ILLIES.

A decree in bankruptcy passed, in 1843, by the District Court of the United States for the Eastern District of Louisiana, did not pass to the assignee the title to a house and lot in the city of Galveston and State of Texas, which house and lot were the property of the bankrupt.

Texas was then a foreign state, and whatever difference of opinion there may be with respect to the extra-territorial operation of a bankrupt law upon personal property, there is none as to its operation upon real estate. This court concurs with Sir William Grant, in 14 Vesey, 537, that the validity of every disposition of real estate must depend upon the law of the country in which that estate is situated.

Besides, the deed made by the assignee in bankruptcy to one of the parties in the present cause was not made conformably with the laws of Texas; and letters of administration upon the estate of the bankrupt had been taken out in Texas before the fact of the bankruptcy was known there; and the creditors of the estate in Texas had a better lien upon the property than the assignee in Louisiana.

THIS cause was brought up, by writ of error, from the District Court of the United States for the District of Texas.

It was an ejectment, conducted by way of petition and answer, for a house and lot in the county and city of Galveston, in the State of Texas, being lot No. 13 in block No. 681.

The suit was brought by Oakey against Bennett, the admin-

istrator of William Hall, and John H. Illies, tenant in possession. In the bill of exceptions the suit is denominated an action of "trespass to try titles"; but as the petition prayed for the restoration of the property, as well as damages, it seems more proper to call it an ejectment.

Upon the trial, the plaintiff sought to derive his title from Hall, under whom the defendants claimed also.

In 1842, Hall was in possession of the lot by purchase from John S. Snydor, but no deed was at that time made.

On the 9th of February, 1843, Hall (calling himself William Hall, late of Galveston, Texas) filed a petition in the District Court of the United States for the Eastern District of Louisiana, praying for the benefit of the bankrupt act of the United States, passed August 19th, 1841. The legal notice was given, and on the 10th of March, 1843, he was declared a bankrupt, and F. B. Conrad, of New Orleans, appointed assignee.

On the 3d of April, 1843, Snydor executed a deed to Hall of the house and lot in Galveston.

In March, 1844, Hall died, and Bennett, the defendant, was appointed administrator by the Probate Court of Galveston County in Texas.

In May, 1845, Conrad, the assignee of Hall, petitioned the District Court for an order to sell the effects of the bankrupt, and, the usual preliminary proceedings being had, a public sale took place for cash. An article in the inventory was "all the right, title, and interest of the bankrupt in and to a house and lot in Galveston, Texas." Samuel W. Oakey became the purchaser of this for the price of four hundred dollars, and on the 18th of June, 1845, Conrad executed to Oakey a deed which conained the following recital, viz.:—

"And the said William Hall, bankrupt, at the time he filed his petition in said court to be declared a bankrupt, and at the time, said 10th March, 1843, when he was declared and decreed a bankrupt, was possessed of a claim to a house and lots in the city of Galveston, of the exact nature of which the said Francis B. Conrad, assignee as aforesaid, could not obtain any exact knowledge or description; which claim, whether it was one or in plurality, on a house or houses, building or buildings, more or less in number, of lots, parcel, or parcels of land, be they what they were, situated in the city of Galveston, republic of Texas, by said act of Congress, and the decrees of said court on said bankrupt's petition, with all his property and rights of property, of every name and nature, and whether real, personal, or mixed, became, by the mere operation of said act thus made and provided, *ipso facto* from the time of such decree aforesaid, and was deemed to be, divested out of such bank-

rupt, without any other act, assignment, or conveyance whatsoever, and the same became vested by force of the same in Francis B. Conrad, assignee as aforesaid. All of which rights of property or real estate, whatever might be the nature of his title thereto, or interest therein, which was situated in the city of Galveston, republic of Texas, it was my intention to sell, as assignee as aforesaid, at public auction; and the said court, on considering my petition to that effect, made judgment thereon, and issued an order of sale under date of 23d May, 1845; and by virtue of said order of sale by said court, and after due and lawful advertisement made by William F. Wagner, United States marshal for the district, and at the time and place designated in said advertisement, at the hour of 12, noon, on this 18th day of June, A. D. 1845, the said marshal did, under my direction, then and there publicly cry, adjudicate, and sell to Samuel W. Oakey, the last and highest bidder, as follows, viz.: 'all the right, title, and interest of the said bankrupt (William Hall) in and to a house and lots in the city of Galveston, Texas, being lot 13, block 681, or lot 9, block 622, or both,' and sold without any guaranty whatever. The said Samuel W. Oakey became the purchaser for the price and sum of four hundred dollars, the receipt of which is hereby, as it already has been, acknowledged. In consideration thereof, I, the said Francis B. Conrad, assignee as aforesaid, have bargained, sold, conveyed, assigned, transferred, set over," &c., &c.

This deed was afterwards recorded in Texas.

On the 12th of December, 1846, Bennett settled an account with the Probate Court, showing that he was in advance for the estate $ 1,811.03.

On the 25th of January, 1847, Oakey filed a petition in the District Court of the United States for the District of Texas, which, after having been the subject of sundry pleas and demurrers and motions, was finally withdrawn, and an amended petition filed on the 31st of May, 1848. This was the subject of some motions too, but at length issue was joined, on the 5th of June, 1848, and the cause came on for trial. Being left to a jury, they found a verdict for the defendants.

The bill of exceptions sets forth all the deeds offered in evidence by the plaintiff, for the purpose of showing a title in Hall, and also the record of the proceedings in bankruptcy, to show that this title passed to himself. This part of the bill is not necessary to an understanding of the prayers addressed to the court, and it is therefore omitted. Nor is it necessary to insert the evidence, as offered by the defendant, to prove interlineations and falsifications of the record. The following are the prayers addressed to the court on the part of the plaintiff.

"The plaintiff requests the court to charge the jury,—

"1st. That if the jury find, from the evidence, that at the date of Hall's bankruptcy he was seized and possessed of the premises in question, and that, being so possessed, he, Hall, voluntarily applied to the honorable United States District Court of Louisiana to be declared a bankrupt, and was, in accordance with the act of Congress of the 19th of August, 1841, adjudged and decreed by the court to be a bankrupt, such voluntary petition and decree operated to divest and pass Hall's estate in the premises, and vested the property as absolutely in Hall's assignee as he, Hall, might have done by his own voluntary conveyance.

"(Which instruction the court gave.)

"2d. That if the said assignee, Conrad, so appointed by said court, in execution of the order of said court sold said property to plaintiff for a valuable consideration, such bankruptcy, decree, order, sale, and purchase passed the right of property as effectually to plaintiff as Hall might have done by his voluntary deed of conveyance.

"(Which second instruction the court refused to give.)

"3d. That if Hall did petition, and at the time of his petition in bankruptcy surrendered the premises in question as part of his assets, although he only had possession thereof under a purchase by inchoate title, which was afterwards perfected by full grant, such subsequently acquired title enured to the benefit of plaintiff.

"(Which third instruction the court refused.)

"4th. That if the jury find from the evidence that Hall applied to the proper court, by his own voluntary petition, for the benefit of the act of Congress of the United States of the 19th of August, 1841, and obtained a decree of bankruptcy on said voluntary application, then all the property of said Hall, of every kind and nature whatever, real, personal, or mixed, was thereby divested out of said Hall, and vested as fully and effectually in his proper assignee, duly appointed, as the same was previously vested in Hall.

"(Which instruction the court gave.)

"5th. That the act of the United States Congress of the 19th of August, 1841, was recognized and adopted by the laws of Texas as part of the law of the republic of Texas.

"(And this fifth instruction the court refused to give, saying, that the law of the republic of Texas referred to recognized the bankrupt's discharge, but did not affect his real estate, and here directs the clerk to insert the law referred to, which is an act of the republic of Texas, approved February, 1841, laws of that year, p. 143, entitled "An Act for the relief of

those who have taken the benefit of the insolvent laws of other countries."

"6th. That if Hall made a voluntary assignment in Louisiana of the premises in question, in order to obtain the benefit of the said act of the 19th of August, 1841, such assignment was, and is, in point of law, equivalent to a voluntary conveyance made by Hall of said premises to the plaintiff.

"(Which instruction the court refused.)

"7th. That the transcript of the record, marked A, from the United States District Court of Louisiana, is competent and conclusive evidence of what it purports to contain, and what is recited therein; and that under law said transcript of record is entitled to full faith and credit.

"8th. That Bennett is in no better condition in relation to the property in controversy than Hall himself would have been had he been living and the defendant in this suit.

"(This charge, the eighth, the court gave.)

"As to the seventh instruction asked, the court charged the jury that full faith and credit should be given to the transcript of the record of the court in Louisiana; that is, that it is entitled to the same force and efficacy here that it would be entitled to in the court where the transaction was had, and of which it purports to be the record; that in this court, as in that, parol testimony is competent to show that that which claims to be a record is void for forgery.

"9th. That if the jury believe from the evidence, that after Hall's act of bankruptcy he became a citizen of Texas, Oakey being and remaining a citizen of the United States until the annexation of Texas to the United States, then, by the act of annexation, the property in question became as absolutely Oakey's as though Texas had been one of the United States at the date of the bankruptcy, the act of annexation having, by relation, removed every disability growing out of the laws of the place where the land is situated, and of Oakey's personal right to hold.

"(Ninth refused by the court.)

"10th. That if the jury believe from the pleadings and evidence that Oakey has derived his title from or through Hall's voluntary act, either of record or by conveyance, and that the defendant Bennett only claims as Hall's administrator, and Illies as his tenant, then Bennett is only the personal representative of Hall, and, as such, a proxy, and as fully and effectually estopped from denying Oakey's title as Hall himself would have been, and that Hall would have been absolutely estopped.

"(Refused by the court.)

"11th. That, if the jury find for the plaintiff, they may find the rents as damages.

"(Which the court gave.)

"12th. That the act for the relief of persons who have taken the benefit of foreign insolvent laws of Texas, passed February, 1841, (before referred to,) recognizes a surrender under a foreign bankrupt law, if honestly made, as a valid and legal mode of transferring the bankrupt's real estate lying in Texas.

"(Which the court refused.)

"12th. That Oakey is vested with all the rights that were vested in Conrad by virtue of his due appointment as assignee of Hall.

"(And this twelfth instruction the court refused to give.)

"And to the failure and refusal of the court to give the instructions hereinbefore asked, and by the court refused as noted, and to the giving the said several instructions not asked, which by the court were given as hereinbefore set forth, the said plaintiff at the time excepted.

"And now, for the purpose of saving the said several exceptions taken, as well as to set forth the whole facts of the case, the court seals this bill of exceptions, and orders the same to be filed and made a part of the record, which is done 5th June, 1848. JOHN C. WATROUS, [L. S.]

U. S. Judge."

The case came up to this court upon all these points.

It was argued by *Mr. Hall*, for the plaintiff in error, and *Mr. Rogers* and *Mr. Howard*, for the defendants in error, with whom were *Mr. Ovid F. Johnson* and *Mr. Harris.*

The points made in the arguments of counsel which are not touched upon in the opinion of the court are omitted in this report.

Mr. Hall, for plaintiff in error.

Third Point. There was error in the court below in refusing to charge that the plaintiff became vested with the rights of property, which had been vested in Conrad by Hall's bankruptcy. (Charge asked for in Nos. 2 and 12.)

1. The court had charged that the decree which discharged Hall divested him of his property, and vested it in Conrad. And therein it was correct. General Bankrupt Law, § 3.

2. That the vested property in Conrad, when deeded to the plaintiff, passed Hall's rights, is a *sequitur* of the charge given. The assignee had power to deed. General Bankrupt Law, § 15.

3. The surrender and conveyance in Louisiana passed the

property in Texas. This while she was yet a republic. Proviso in Act, 5 Texas Laws, p. 44; Dallam's Digest, pp. 94, 95; Carr's Guardian *v.* Wellborn, Dallam's Digest, p. 624, and 1 Texas Reports, 463.*

4. This was not a *compulsory*, but a *voluntary* transfer. A bankrupt's property out of the jurisdiction of the tribunal passing it *may* not be transferred as against creditors of the *locus rei sitæ*, when *compulsory* or scheduled in general terms; but if he voluntarily surrenders it, it passes. Selkrig *v.* Davies, 2 Rose, B. C. 291; Story, Conflict of Laws, § 38; Bank of Augusta *v.* Earle, 13 Pet. 519; 16 Pet. 57.

Fourth Point. Had Hall been defendant in this suit, he would have been estopped from resisting plaintiff; and there was error in the refusing so to charge by the court. He had voluntarily surrendered property. It had vested in an assignee. That assignee had deeded it to plaintiff. Hall and the plaintiff were privies in the successive relationship of the latter to the former as to the same rights of property. 1 Greenleaf on Evidence, § 189.

The effect of Hall's surrender was to vest his property in his assignee, and in whomever the assignee might sell to. He is presumed to have known this, for it was the effect of his own deed. Even if in law his surrender in Louisiana did not pass Texas property, *he* could not set it up. *Nullus commodum capere potest de injuriâ suâ propriâ.* And surely either Hall or his privy in representation cannot now deny the title of plaintiff, who, a *bonâ fide* purchaser, by reason of their own act, will else be prejudiced by their taking advantage of Hall's wrong (assuming that any existed).

Fifth Point. If Hall was thus estopped, Bennett, the defendant, was also estopped. (Error in charging to contrary.) That he was in the same condition in which Hall, if defendant, would have been, was charged by the court. And this was so. Bennett was Hall's administrator, and his privy in representation. 1 Greenleaf on Evidence, § 189. The admissions of an intestate bind his administrator. Smith *v.* Smith, 3 Bing. N. C. 29; Ivat *v.* Finch, 1 Taunt. 141.

The record of bankruptcy was in evidence, which would have bound Hall, and also Bennett, his administrator. 1 Greenleaf on Evidence, §§ 522, 523. There was no evidence to show that Bennett was holding for creditors. He was Hall's administrator in a personal capacity only.

* Texas had recognized and applied the force of the common law of England, as her rule of jurisprudence, whenever not in conflict with her own laws. By the common law of England the title of foreign assignees was recognized. Sill *v.* Worswick, 1 Hen. Bl. 691.

Sixth Point. The title to the property in controversy (lot 13, block No. 681, city of Galveston) was in Hall when he was decreed bankrupt, — the time at which his property vested in the assignee. General Bankrupt Law, § 3.

Hall bought from Snydor, in the autumn of 1842, by parol agreement; went into occupation, and made improvements. Snydor testifies, that he considered Hall owner all this time; "he would have made the deed at any time after the bargain and sale." The deed was made April 3d, 1843; discharge by decree, June 16th, 1843.

"In the case of a parol contract for the sale of lands, if afterwards carried into effect by a conveyance, the deed will relate back to the date of the contract," &c. 4 Kent's Com. 451, note, last edition; Clary *v.* Marshall, 5 B. Monroe, 266.

By the Texas statute of frauds, estate for less than five years could be made by parol. Dallam's Digest, 61.

There was part-performance of the parol sale; —

1. By occupation. Wilber *v.* Paine, 1 Ham. Ohio, 251; Gregory *v.* Mitchell, 1 Hoff. 470.

2. By improvements. Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. 274.

Part-performance of parol contract for lands saves the statute of frauds. 4 Kent's Com. 451.

There was error in the face of these matters of fact and law, in refusing to charge as asked for. (Charge 3.)

Seventh Point. If Hall had possessed any creditors in Texas at the time he surrendered his Texas property, (which does not appear so to be,) and who were thereby prejudiced, Hall could have pleaded his discharge in Louisiana against their demands.

This by statute of Texas. It would be a legal mockery, in construing this statute, to say that, while it recognized the validity of a foreign discharge, it did not recognize the *effect* of that discharge. There was error in charging the latter. (Charge 12.)

Eighth Point. As against every person but the State, the assignee, although not a citizen of Texas, as well as plaintiff, could succeed to Hall's rights, and hold land.

Aliens may take by purchase, and hold land, until office found. Fairfax *v.* Hunter, 7 Cranch, 603.

This is so well established, said a distinguished justice of this court, that the reason is only a search for the antiquary.

And until land is seized by the State, aliens may convey or maintain action. 13 Wend. 546.

Naturalization relates back, and confirms title to land purchased during alienage. Jackson *v.* Beach, 1 Johns. Cas. 399.

Texas, as a republic, having slept on her rights to escheat the land vested by Hall in his assignee, (conceding, *argumenti gratiâ*, such right to have existed,) when admitted as a State, the disability of the assignee was removed; and the annexation operated to confirm his title in the same manner as naturalization. There was error in refusing so to charge, as at charge 9.

The points made by the counsel for the defendant were the following:—

1. This is an action of trespass to try title under the statutory regulation of Texas, which declares that the trial shall be regulated by the principles of ejectment. Hartley's Digest of Texas Laws, p. 969. It requires a legal title to sustain the action in this court.

2. The transfer of land by a foreign bankruptcy is not such a title. Whatever may be doubtful as to the effect of a foreign assignment in bankruptcy upon personal estate, it is universally admitted that it cannot convey real property, which is regulated by the law of the *situs*. Story, Conflict of Laws, §§ 422 *a*, 428, 591.

3. The record shows that Oakey was a citizen of Louisiana at the date of the sale to him. He was therefore an alien, and the tenth section of the general provisions of the constitution of the republic forbids aliens to hold land except by titles emanating from the government. Hartley's Dig. 38; Story, Confl. § 429. At common law a party may take by purchase, and hold until office found; but he cannot take by operation of law, or by descent, or by bankruptcy. As he cannot hold, the law will not cast the title upon him.

4. The act of the Texas Congress does not recognize conveyances by foreign bankrupt assignments. It is confined to the effect of the *discharge*. The discharge is one thing, the assignment another, and they are quite different in their effects. The Texas bankrupt law required a regular deed of assignment from the debtor. Hartley's Dig. 114, 115.

5. The bankrupt law of the United States of 1841 does not provide for an assignment. It requires the applicant to present a petition, with a list of his creditors and their places of residence, together with a schedule of his property, &c., and when declared a bankrupt, the third section provides that title to all his property, real and personal, shall be vested in assignees "by operation of law," without any other assignment or transfer. Such an act can have no extra-territorial force on real property, for the obvious reason, that there would be a defect of jurisdiction. The authority of the court could not extend to lands beyond the United States.

The title to lands must be passed according to the law of the *situs*. The pretended transfer of the assignee, Conrad, could not pass title to lands in Texas, because it was not a deed at common law, nor according to the provisions of the laws of Texas. It had neither a seal, nor the scroll recognized by the statutes of Texas. It had no subscribing witness, nor was it acknowledged before any judge or other officer, as required by the statutes of Texas. If the judgment of the court of bankruptcy could have had any extra-territorial force or authority to transfer real estate, the instrument of the commissioner Conrad cannot operate as a deed to pass the fee. Hartley's Dig. 128. Under any aspect of the case, it could not support ejectment. More especially when it was shown that there were Texas creditors at the time Hall was declared a bankrupt.

6. The registered copy of the conveyances was not competent evidence, because not legally admitted to record. The originals were not acknowledged and proved, as required by the Texas registry act, and were not, therefore, evidence under her judiciary act. Hartley, 839; Ib. 255.

7. The description in the transfer of the commissioner, of a "house and lot in Galveston," was not sufficient without the interlineation of the number and block, which was proved by the marshal to have been made after the sale, and in the handwriting of the vendee. This of itself was sufficient to avoid the deed unless explained, and the *onus* of the explanation was on the vendee.

The following authorities were cited in addition, to show that title to land in Texas did not pass to the assignee of a bankrupt under the laws of a foreign country:— Kirby, 313; 1 Har. & McHenry, 236; 2 Ib. 463; 2 Hayw. 24; 4 McCord, 519; 1 Rep. Con. Ct. 283; 6 Binney, 353; 6 Pick. 286; Bee, 244; 5 Cranch, 302; 12 Wheaton, 361; 3 Wendell, 538; 2 Kent's Com., 1st edition, 330; 20 Johnson, 254; 4 Wheaton, 213; 2 Story, 360 and 630; 1 Metcalf and Perkins's Dig. 400, pl. 123, 124; 1 U. States Dig. (Supplement), 270, pl. 93, 94.

Mr. Justice McLEAN delivered the opinion of the court.

A writ of error to the District Court of the United States for Texas brings this case before us.

Under the forms of procedure in Texas, an action was commenced by petition, on the 25th of January, 1847, by the plaintiff, for the recovery of a house and lot in the city of Galveston, Texas, described in the plan of said city, number thirteen, in block six hundred and eighty-one. The plaintiff gave in

evidence a deed from the proprietors of the city for the lot in controversy to James S. Holman, dated 1st June, 1840. The same lot, on the 3d of April, 1843, was conveyed to William Hall, by Snydor, the attorney of Holman. The purchase was made by Hall, some time before the deed was executed, and he entered into the possession of the lot, made improvements thereon, and continued to occupy it until his death. The defendant Illies has been in possession of the lot since the death of Hall.

On the 9th of February, 1843, William Hall ("late of Galveston, Texas") filed his petition for the benefit of the bankrupt law, in the District Court of the United States for the Eastern District of Louisiana, and on the 10th of March following he was declared a bankrupt. A schedule of his assets was filed, among which was the lot now in controversy. Francis B. Conrad, of the city of New Orleans, was appointed his assignee, who gave bond as required. The assignee, on application to the District Court, obtained an order for the sale of the house and lot, and they were sold, in pursuance of such order, to Oakey, the plaintiff, on the 18th of June, 1845, to whom a deed was executed on the same day by the assignee.

Before the commencement of the suit, in 1844, Hall died, and Bennett, the defendant, was appointed his administrator in Texas. Process was issued against him, and also against Illies, the person in possession, who refused to recognize the right of the plaintiff.

In his answer Bennett avers, that the petition and the matters and things therein set forth are not sufficient in law, &c., and he prays judgment, &c. And for further answer he states, that Hall departed this life before the annexation of Texas to the United States, and that administration of his estate was duly granted to the defendant. That he proceeded in the discharge of his duties, and he exhibits accounts against the estate of Hall, by himself and other citizens of Texas, which were allowed by the Probate Court, amounting to the sum of $1,811, before any conveyance of the house and lot by the assignee of Hall was set up or registered in Galveston County, as the law required. And he avers that there is no property to satisfy the debts of the estate, except the house and lot in controversy.

Many points were raised, on which bills of exception were taken to the rulings of the court, in the progress of the trial, but the validity of the deed of the assignee to the plaintiff is the great question in the case.

There can be no doubt, the proceedings in bankruptcy being regular and *bonâ fide*, that the property of the bankrupt, within

the appropriate jurisdiction, became vested by the act of Congress in his assignee. At the time of the decree of bankruptcy, and until a short time before the sale and conveyance of the property in question to the plaintiff, Texas was an independent republic, and in every respect a foreign state to the government of the United States.

In this country there is some diversity of opinion among the State courts, whether a bankrupt law, in regard to personal property, has an extra-territorial operation. That it has such operation is a doctrine which seems to be well settled in England by numerous decisions, and particularly in the Royal Bank of Scotland *v.* Cuthbert, (1 Rose's Bankrupt Cases, Appendix, 462, and 2 Rose's Cases, 291,) in which Lord Eldon said: "One thing is quite clear, that there is not in any book any dictum or authority that would authorize me to deny, at least in this place, that an English commission passes, as with respect to the bankrupt and his creditors in England, the personal property he has in Scotland or in any foreign country."

It is held in England, that an assignment of personal property under the bankrupt law of a foreign country passes all such property and debts owing in England; that an attachment of such property by an English creditor, with or without notice, after such an assignment, is invalid. And the doctrine is there established, that an assignment under the English bankrupt law transfers the personal effects of the bankrupt in foreign countries. But an attachment by a foreign creditor, not subject to British laws, under the local laws of a foreign country, is held valid. The principle on which this doctrine rests is, that the personal estate is held as situate in that country where the bankrupt has his domicile.

A statutable conveyance of property cannot strictly operate beyond the local jurisdiction. Any effect which may be given to it beyond this does not depend upon international law, but the principle of comity; and national comity does not require any government to give effect to such assignment, when it shall impair the remedies or lessen the securities of its own citizens. And this is the prevailing doctrine in this country. A proceeding *in rem* against the property of a foreign bankrupt, under our local laws, may be maintained by creditors, notwithstanding the foreign assignment.

But it is an admitted principle in all countries where the common law prevails, whatever views may be entertained in regard to personal property, that real estate can be conveyed only under the territorial law. The rule is laid down clearly and concisely by Sir William Grant, in Curtis *v.* Hutton, 14

Ves. 537, 541, where he says, "The validity of every disposition of real estate must depend upon the law of the country in which that estate is situated." The same rule prevails generally in the civil law. Boullenois, John Voet, Christinæus, and others, (cited in Story, Conflict of Laws, 359, 360,) say, "As a general rule, movable property is governed by the law of the domicile, and real property by the law of the *situs rei*."

This doctrine has been uniformly recognized by the courts of the United States, and by the courts of the respective States. The form of conveyance adopted by each State for the transfer of real property must be observed. This is a regulation which belongs to the local sovereignty.

It is argued that the entire interest in the property in dispute passed, under the bankruptcy, to the assignee of Hall; and that, it being sold under the order of the District Court to the plaintiff, the title is vested in him, the same as if the conveyance had been executed by Hall.

On the appointment and qualification of the assignee, the property of the bankrupt, under the act of Congress, became vested in him, for the benefit of the creditors of the bankrupt. But there was no assignment in fact made by Hall. He made application for relief under the law, and may be said to be a voluntary bankrupt; but there was no other assignment of his effects than that which resulted from the operation of the law. As, under the Constitution, Congress exercised an exclusive jurisdiction over the subject of bankruptcy, the same rule of procedure extended throughout the Union. But the act of Congress could have no extra-territorial effect. Texas was an independent republic at the time of the decree in bankruptcy, and consequently no claim under it, even as regards personal property, in that republic, could be made, except on the ground of comity. And on our own principles this could not be done, to the injury of local creditors.

Hall in his lifetime might have conveyed this property by observing the forms adopted by Texas. But the assignee took no legal estate in the premises under the bankrupt law; and consequently he could not convey such an estate to the plaintiff. No proposition would seem to be clearer of doubt than this. It is believed that no sovereignty has, at any time, assumed the power, by legislation or otherwise, to regulate the distribution or conveyance of real estate in a foreign government. There is no pretence that this government, through the agency of a bankrupt law, could subject the real property in Texas, or in any other foreign government, to the payment of debts. This can only be done by the laws of the sovereignty where such property may be situated.

forces of the United States from the commencement of the war. When the land forces arrived, and the siege was about to commence, General Scott and Commodore Perry (who commanded the blockading squadron) agreed to leave the blockade open to the consuls and other neutrals, to pass out to their respective ships of war, until the 22d of March, after which all communication with the besieged city was interdicted.

On the 13th of March, a French vessel called La Jeune Nelly came into the port, having run the blockade. She came in in the daytime, with her colors flying, nor is there any evidence in the record to show that it was known in Vera Cruz that she had come into port without permission from the blockading ships. She sailed again on the 19th of March, bound for Havre, in open day, and without manifesting any desire for concealment, but yet in breach of the blockade. But there was no evidence that Guillem knew she came in or was sailing out in breach of the blockade. Guillem took passage on board of this vessel with his family, and took with him in gold and silver two thousand eight hundred and sixty dollars, — the whole amount of his three years' earnings in Mexico. The Jeune Nelly had no cargo and sailed in ballast. The money of Guillem was not shipped as cargo, nor invoiced, but was taken with him as a part of his personal effects. The money was chiefly in two bags, which were kept in his state-room, but a part of it was in a belt about his person.

The Jeune Nelly was captured by the blockading squadron a few hours after she sailed; and on the night following was wrecked and totally lost on one of the islands near the port; but the passengers, crew, and all the money and property on board, were saved. The passengers and crew were immediately released, and the money of Guillem and other property on board were taken possession of by the orders of Commodore Perry, and sent to New Orleans for adjudication. It was libelled in the District Court, and condemned, as lawfully seized. Guillem appealed from this decree to the Circuit Court, where it was reversed, and the money in question directed to be restored and refunded to him. The captors appealed from this last-mentioned decree to the Supreme Court.

It was argued by *Mr. Crittenden* (Attorney-General), for the appellants, and *Mr. Soulé*, for the claimant.

Mr. Crittenden, for the appellants.

As it has been set up and insisted on that Guillem, in embarking on board the Jeune Nelly, acted under permission of General Scott, it is necessary to ascertain what actually took

place at the time at Vera Cruz. The correspondence of General Scott, as to the operations of the army before Vera Cruz, will be found annexed to President Polk's message to Congress of December, 1847, in 1 Senate Documents, p. 216, *et seq.* From this correspondence it appears that the landing of the troops was effected on the 9th of March, and that on the 13th, in answer to a request of the French and Spanish consuls that in his operations he might respect the persons and property of French and Spanish subjects, he communicated to them, that in carrying the city, whether by bombardment or assault, it would be exceedingly difficult, particularly in the night-time, for his forces to see the consular flags, or to discriminate between the persons and property of friends and the persons and property of the enemy; he could, therefore, only promise to do all that circumstances might possibly permit to cause such discrimination to be observed. He also sent them safeguards under his signature. (p. 219.) By a letter of his to Commodore Perry, of the 22d, it appears that up to that time intercourse had been allowed between the neutral vessels of war and the city and castle of Vera Cruz, but was then put an end to. (p. 228.) And a communication to that effect was made by Commodore Perry to the commanders of the neutral ships of war. (p. 228.) It was not until the 24th that the British, French, Spanish, and Prussian consuls addressed General Scott, praying him to suspend hostilities, and to grant a truce, to enable their countrymen to leave the place with their women and children. (p. 229.) In a despatch to the Secretary of War, under date of the 25th, General Scott says: — "All the batteries, Nos. 1, 2, 3, 4, and 5, are in awful activity this morning. The effect is no doubt very great, and I think the city cannot hold out beyond to-day. To-morrow morning many of the new mortars will be in a position to add their fire, when, or after the delay of some twelve hours, if no proposition to surrender should be received, I shall organize parties for carrying the city by assault. So far, the defence has been spirited and obstinate.

"I inclose a copy of a memorial received last night, signed by the consuls of Great Britain, France, Spain, and Prussia, within Vera Cruz, asking me to grant a truce to enable the neutrals, together with Mexican women and children, to withdraw from the scene of havoc about them. I shall reply, the moment that an opportunity may be taken, to say, — 1st. That a truce can only be granted on the application of Governor Morales, with a view to a surrender. 2d. That in sending safeguards to the different consuls, beginning as far back as the 13th instant, I distinctly admonished them, particularly the

French and Spanish consuls, and of course through the two the other consuls, of the dangers that have followed. 3d. That although at that date I had already refused to allow any person whatever to pass the line of investment either way, yet the blockade had been left open to the consuls and other neutrals, to pass out to their respective ships of war, up to the 22d instant. And, 4th. I shall inclose to the memorialists a copy of my summons to the governor, to show that I had fully considered the hardships and distresses of the place, including those of women and children, before one gun had been fired in that direction. The intercourse between the neutral ships of war and the city was stopped at the last-mentioned date, with my concurrence, which I placed on the ground that that intercourse could not fail to give to the enemy moral aid and comfort." (pp. 225, 226.)

General Scott accordingly, on the same day, addressed a communication to the consuls of the nature above indicated, in which he says that he deeply regrets the lateness of their application, for up to the 22d instant the communication between the neutrals in Vera Cruz and the neutral ships of war lying off Sacrificio was left open, mainly to allow those neutrals an opportunity to escape from the horrors of the impending siege, of which he gave to the consuls every admonition in his power. (pp. 230, 231.) This communication was made known to the Mexican general, and led to the capitulation.

From the preceding narrative it appears that the only permission to neutrals given by General Scott or Commodore Perry, was to pass from Vera Cruz to the ships of war of their respective nations.

No treaty stipulations between the United States and France, on the subject of blockade, were in existence at the date of these occurrences. There was a convention made between them on the subject, in 1800, but which was to last only eight years. After the expiration of that time, it does not seem to have been renewed.

The cause is now to be heard in the Supreme Court, on an appeal taken by the United States from so much of the decree of the Circuit Court as is in favor of Guillem for the amount claimed by him.

There can be no question that the Jeune Nelly was liable to capture for breach of the blockade, and such was the answer of our own government to that of France, when it made reclamation on behalf of the owner for the value of the vessel. She was guilty of a violation of blockade, both in going into Vera Cruz and coming out of it.

The guilt of a breach inward is not discharged until the end

of the return voyage; and if a vessel is taken in any part of that voyage, she is taken *in delicto*. The Frederick Molke, 1 Rob. 87; The Lisette, 6 Rob. 395; The Joseph, 8 Cranch, 451.

The act of egress is as culpable as the act of ingress. The case of the Frederick Molke, above cited, is identical with the present. The Vrouw Judith, 1 Rob. 151; The Neptunus, 1 Rob. 171; The Adelaide, 2 Rob. 111, note. The cases of the Juffrow Maria Schrœder, 3 Rob. 153, and the Welvaart Van Pillaw, 2 Rob. 130, decide that the offence of running a blockade outward is not purged until the end of the voyage, and that until then the vessel so guilty is subject to capture by any cruiser of the blockading power.

There are exceptions in the case of egress. "A ship that has entered previous to the blockade may retire in ballast, or taking a cargo that has been put on board before the blockade." The Juno, 2 Rob. 118. That a belligerent may lawfully blockade the port of his enemy is admitted; but it is also admitted that this blockade does not, according to modern usage, extend to a neutral vessel found in port, nor prevent her coming out with the cargo which was on board when the blockade was instituted. Olivera *v.* Union Insurance Company, 3 Wheat. 194; 1 Kent, 147. The Jeune Nelly does not come within either of these exceptions. There are other exceptions, for which see Wheaton's Elements, 548, and 2 Wildman, 201, but which have no bearing in this case.

But to come to the question in the case, Were the property and effects of the neutral Guillem, on board the Jeune Nelly when she broke the blockade outward, liable to capture? The court below has decided they were not, on the ground that Guillem had left Mexico with an intention to return to France, and therefore was no longer a resident of the power with whom the United States were at war. It is a well-known law, that, if a neutral reside in the country of one of the belligerents, his property and effects sent from that country are liable to capture by the other, as enemy's property, wherever found on the ocean. 1 Kent's Com. 75. A national character, however acquired by residence, may be thrown off at pleasure by a return to the native country. It is an adventitious character, and ceases by non-residence, or when a party puts himself in motion, *bonâ fide*, to quit the country, *sine animo revertendi*, and such an intention is essential to enable him to resume his native character. 1 Kent's Com. 78.

But with all due deference it is submitted that these doctrines have no application in a case of capture for breach of blockade. A blockade has the effect to seal and shut up the blockaded port against all trade whatsoever. Sir William

Scott says it would not properly be a blockade unless neutrals were restricted.

"A blockade may be more or less rigorous, either for the single purpose of watching the military operations of the enemy, and preventing the egress of their fleet, as at Cadiz; or on a more extended scale, to cut off all access of neutral vessels to that interdicted place, which is strictly and properly a blockade; for the other is, in truth, no blockade at all, as far as neutrals are concerned. It is an undoubted right of belligerents to impose such a blockade, though a severe right, and as such not to be extended by construction; it may operate as a grievance on neutrals, but it is one to which, by the law of nations, they are bound to submit." The Juffrow Maria Schrœder, 3 Rob. 154.

The decision in the case of the Vrouw Judith, 1 Rob. 151, which was a case of violation of blockade outward by a neutral, says: "Now, with respect to the matter of blockade, I must observe that a blockade is just as much violated by a vessel passing outwards as inwards. A blockade is a sort of circumvallation round a place, by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of the place, and a neutral is no more at liberty to assist the traffic of exportation than of importation."

"To shut up the ports of a country, and exclude neutrals from all commerce, is a great inconvenience upon them, although it is one to which they are bound to submit; for there is no principle of the law of nations better established, than that a belligerent has a right to impose a blockade on the ports of his enemy." The Juno, 2 Rob. 117.

On the part of the United States it will therefore be contended: —

1. That the money of Guillem was liable to capture.

The consequence of a breach of blockade is the confiscation of the ship, and the cargo is always *primâ facie* implicated in the guilt of the owner and master of the ship. 1 Kent's Com. 151.

In the case of the Mercurius, 1 Rob. 84, it is decided that, to make the conduct of the ship affect the cargo, it is necessary to show that the owners of the cargo were conusant of the blockade before the cargo was shipped; or to show that the act of the master binds them.

The blockade of Vera Cruz was established shortly after the declaration of war, in May, 1846. Now Guillem was at that time, and up to the day of his departure, living in the city, and must have daily seen the blockading squadron cruising off the port, and could not pretend ignorance of the blockade. Both

in his claim and examination as a witness, he admits that he knew of it; yet, with full knowledge of its existence, and as if in defiance and derision of it, he embarked his property on board. He was, therefore, by his own admission, guilty, and his property is good prize. "A breach of blockade subjects the property of all those concerned in it to confiscation. The penalty attaches to all those who are privy to the fraud, by themselves or their agents. 2 Wildman, 203, referring to the case of the Wasser Hundt, Dodson, 27.

But it is said that this money is not good prize, because it was not shipped as cargo. In maritime warfare, private property taken at sea, or afloat in port, is indiscriminately liable to capture and confiscation. Wheaton's Elements, 405.

Besides, money has been recognized by Congress as good prize of war. By the eighth article of the rules and regulations of the navy, (2 Stat. at Large, 46), it is declared: "That no person shall take out of a prize, or vessel seized as prize, any money, plate, goods, or any part of her rigging, unless it be for the better preservation thereof, or absolutely necessary for the use of any of the vessels of the United States, before the same shall be adjudged lawful prize by a competent court; but the whole, without fraud, concealment, or embezzlement, shall be brought in, and judgment passed thereon, upon pain that every person offending herein shall forfeit his share of the capture, and suffer such further punishment as a court-martial, or the court of admiralty in which the prize is adjudged, shall impose."

And by the ninth article it is declared: "That no person in the navy shall strip off their clothes, or pillage, or in any manner maltreat persons taken on board a prize, on pain of such punishment as a court-martial shall adjudge."

It has been before remarked, that Lieutenant McLaughlin must have been misinformed as to the money being taken from the persons of the people found on board the Jeune Nelly. Guillem himself admits that, with the exception of the ninety-seven and a half doubloons, it was taken by the boats of the Mississippi from the wreck to that vessel, in buckets, the bags containing it having burst. As to the imputation cast upon an officer who is not named, as to the ninety-seven and a half doubloons, there is not a particle of evidence in the case to sustain it.

2. That no permission had been given either by General Scott or Commodore Perry, at the time Guillem left Vera Cruz, allowing neutrals to leave that port with their property.

By the letters of General Scott and Commodore Perry before referred to, all the permission allowed to neutrals was to

have intercourse with the vessels of war of their respective countries, and even that permission was withdrawn on the 22d of March.

General Scott, in his letter of that date to Commodore Perry, says: "I have this moment received your note of this date, inquiring whether, in my opinion, it may not be a necessary measure of expediency to stop, for the present, the intercourse heretofore allowed between the neutral vessels of war, off this coast, and the city and castle of Vera Cruz." General Scott approved of the course suggested.

Commodore Perry, in his letters to the commanders of the foreign vessels of war, on the same day, says: "The city and castle of Vera Cruz being now closely besieged and blockaded by the military and naval forces of the United States, it has become necessary to prevent all communication from outside, unless under a flag of truce. I am, therefore, constrained to inform you, that all intercourse between the vessels and boats under your command, and that part of the Mexican coast encompassed by the United States forces, must for the present cease."

General Scott, in his letter to Secretary Marcy under date of the 25th of March, says: "That, although on the 13th of March I had already refused to allow any persons whatever to pass the line of investment either way, yet the blockade had been left open to the consuls and other neutrals, to pass out to their respective ships of war, up to the 22d instant," and that this intercourse was then stopped.

General Scott's letter to the consuls is to the same effect, speaking only of communication between the neutrals in the city and the ships of war of their respective nations.

There is not one word in these letters which affords a pretence to say that neutrals were allowed to ship their property.

This case has been presented as one of hardship. On this subject the court said, in the case of the Joseph, 8 Cranch, 454: "Although these considerations, if founded in truth, present a case of peculiar hardship, yet they afford no legal excuse which it is competent to this court to admit as the basis of its decision."

Mr. Soulé, for the claimant, made the following points: —

1st. Guillem was a native of France not naturalized, had resided in Mexico only three years, was not a merchant or trader, but only a cook. The money carried by him was not shipped as cargo, did not appear on any manifest, and was his necessary means of support; and was no more to be interfered with than if it had been a bill of exchange or bank-notes.

2d. As soon as neutrals who reside in an enemy's country turn their back on the enemy's country, they resume their neutral character. Wheaton on Int. Law, 371, 374, 375, 378; 1 Kent's Com. 75, 77, 78.

3d. Any one has a right to embark, even in a vessel guilty of the violation of the blockade, as a passenger, and himself and his personal effects are not to be interfered with. The guilt of the vessel does not attach to the passenger and his effects. By personal effects are meant his baggage, wearing apparel, and other property attached to his person, in contradistinction to goods and merchandise.

4th. The permission of General Scott to leave Vera Cruz, and repair on board of national vessels, justifies Guillem in going on board of the Jeune Nelly; and his having taken his passport to go by the British steamer in February, 1847, shows that it was not his intention to violate the blockade; and his embarking in the Jeune Nelly must be considered as an act of necessity and distress, there being no other means of leaving Vera Cruz.

First Point. The nationality of Guillem is proved by his own oath, by the testimony of Cassalet, and the passport of the French consul; and the same evidence proves that he was not naturalized, and that his residence had been only three years. Sir William Scott lays it down that the shortest period of time to establish a residence is four years; and all the authorities seem to consider that the rule of residence and identification with the enemy attaches more particularly to the commercial character, and the property captured is always spoken of as cargo or merchandise. In the present case Guillem was a cook; what he had with him was money, which is a personal effect. In countries where no banks exist, a man travels with gold and silver. The most extraordinary part of this transaction was, that Guillem had ninety-seven and a half doubloons in his pocket; and when invited to change his clothes, which were wet, and he was emptying his pockets for that purpose, an American officer who had proffered him the change of clothes laid his hand upon the money. A cook, no more than any other person, can travel with a wife and children without money. The present case bears not the slightest analogy to the case of Henry Rogers et al. and United States *v.* The American Schooner Amado. In that case, Rogers had resided thirteen years in Mexico, and still remained there. The cargo was taken in a vessel sailing under Mexican colors, which was owned by Rogers, who was a merchant. His residence, the nature of the cargo, and the circumstances under which it was captured, all stamped the

vessel and cargo as Mexican. It has been said by an able writer, that truth depends upon distinction, and that law is the science of distinction. It is impossible for a mind accustomed to discrimination not to perceive the most manifest distinction between the two cases.

Second Point. The second point is fully sustained by the authorities cited; and we have only to inquire whether the facts of the case bring Guillem within the exception laid down in the law. Sir William Scott, in the case of the Harmony (2 Rob. Adm. 324), says: "Time is the grand ingredient in constituting domicile." In most cases it is unavoidably conclusive; and in that case that eminent person decided that four years were sufficient to fix the domicile of the party. In the case of the Indian Chief, determined in 1800, Sir William Scott said (Wheaton on Int. Law, 371): "Taking it to be clear that the national character of Mr. Johnson, as a British merchant, was founded in residence only, that it was acquired by residence, and rested on that circumstance alone, it must be held that, from the moment he turned his back on the country where he had resided, on his way to his own country, he was in the act of resuming his original character, and must be considered as an American. The character that is gained by residence ceases by non-residence. It is an adventitious character, and no longer adheres to him from the moment that he puts himself in motion, *bonâ fide*, to quit the country, *sine animo revertendi*." In the case of the Ocean, determined in 1804, Sir William Scott says (Wheaton on Int. Law, 375): "It would, I think, be going further than the law requires, to conclude this person by his former occupation, and by his constrained residence in France, so as not to admit him to have taken himself out of the effect of supervening hostilities, by the means which he had used for his removal. On sufficient proof being made of the property, I shall be disposed to hold him entitled to restitution." Again, in the case of the Drie Gebroeders (Wheaton on Int. Law, 375), Sir William Scott observes, that "pretences of withdrawing funds are, at all times, to be watched with considerable jealousy; but when the transaction appears to have been conducted *bonâ fide* with that view, and to be directed only to the removal of property which the accidents of war may have lodged in the belligerent country, cases of this kind are entitled to be treated with some indulgence." Wheaton, Int. Law, 378, says: "But this national character which a man acquires by residence may be thrown off at pleasure by a return to his native country, or even by turning his back on the country in which he resided, on his way to another. The reasonableness of this rule can hardly be disputed.

Having once acquired a national character by residence in a foreign country, he ought to be bound by all the consequences of it until he has thrown it off, either by an actual return to his native country, or to that where he was naturalized, or by commencing his removal, *bonâ fide*, and without an intention of returning. If any thing short of actual removal be admitted to work a change in the national character acquired by residence, it seems perfectly reasonable that the evidence of a *bonâ fide* intention should be such as to leave no doubt of its sincerity." The same doctrine is recognized by Kent, as being the rule of decision in the courts of the United States. See Kent's Com. 75, 77, 78, and the authorities there cited.

Guillem comes completely within the rule. The war between Mexico and the United States broke out very unexpectedly in May or June, 1846, without formal declaration, and more resembled the incursions of our aborigines than the usual mode of making war adopted in a civilized country. Commissioners to make peace accompanied our invading army, and no one could realize that there was to be any permanent war between the United States and Mexico, and proposals of peace were expected to accompany every despatch. It was fully expected that, when the Northern army should reach Monterey, the war would certainly come to a close. These circumstances fully explain and account for the stay of Guillem from June 1846, to February, 1847. Some time might be necessary to collect what was due to him; his term of contract might not have expired, and the blockade itself interposed a difficulty against leaving Vera Cruz, for it was not possible to leave Mexico and go to a neutral country otherwise than by sea. But as soon as it was found that the war had assumed a permanent character, that an army had been sent to invade Mexico, Guillem resolved to leave with his wife and children, and the result of their industry and economy, and accordingly prepared to embark in February in the British steamer. The wreck of that vessel on the island of Cuba defeated his intention. His own statement and that of Cassalet of the manner in which La Jeune Nelly entered Vera Cruz, in open day in fine weather, on the 13th of March, might well induce him to believe that she had entered by permission. This was the very day on which, according to General Scott's despatch, he had given permission to neutrals to withdraw. This communication had doubtless been made known to the French naval authorities. It does not appear that La Jeune Nelly took in cargo; and for aught we know she might have considered herself within the permission granted by General Scott, with the consent of Commodore Perry, to leave the blockade open to the consuls and other neutrals, to pass out to their respective

ships of war, up to the 22d of March. If the blockade was left open to neutral persons to pass out, it was surely left open for the neutral vessels which should convey them; and the guilt of La Jeune Nelly in running the blockade, if indeed she did run it, was purged by the permission thus given to neutrals to pass out in neutral vessels, and was the reason why La Jeune Nelly left Vera Cruz on the 20th of March in open day, with her colors flying and fearless of interruption. And this is the reason why the capture of that vessel and her shipwreck have been made cause of claim against the government of the United States. And surely, under these circumstances, the property of Guillem, a neutral who left Vera Cruz with the blockade open, cannot be condemned. La Jeune Nelly was on her way from Vera Cruz to Sacrificios when she was captured and wrecked; and if neutrals were permitted to go to Sacrificios, their movements afterwards cannot be controlled. All these circumstances should be construed very favorably towards a party so peculiarly situated.

Third Point. But admitting that La Jeune Nelly had violated the blockade, and that the permission of General Scott and Commodore Perry to neutrals to depart did not purge the violation, and that she was a guilty vessel, and with her cargo was subject to condemnation, it is contended for the claimant, that this guilt and liability to condemnation do not in any manner extend to a passenger and his effects. The French crew of La Jeune Nelly could not be made prisoners of war, nor punished in any other manner, nor could their personal effects be confiscated; *a fortiori* could not those of a passenger. The decided cases settle beyond dispute, that the person and property of a neutral, withdrawing himself after the breaking out of war from the enemy's country, even on board of an enemy's vessel, are not subject to condemnation. The flag does not protect any enemy's property in neutral bottom, and neutral property, if not contraband of war, is not condemned by the character of the flag or of the bottom; and if, in place of being gold and silver, the currency of the country and the personal effects of the neutral, Guillem had converted his property into any of the productions of Mexico, and sailed in a Mexican vessel with his family, and with the undoubted purpose of withdrawing himself from the Mexican dominions, his property would not have been liable to condemnation. This point is fully established by the case of the Indian Chief, above referred to.

If the argument has satisfied the court that Guillem's three thousand dollars, the earnings of his three years' labor, can in no proper sense of the words of the English language be called cargo, but are, and are to be considered as, the baggage and

personal effects of Guillem, it is impossible to conceive how the conclusion is ever to be arrived at, that they are subject to condemnation because he embarked in a guilty vessel. In favor of neutrals, the laws of war are to be strictly construed. A neutral vessel, violating a blockade, and her cargo, are to be condemned as prize of war; but was it ever heard of that the neutral individuals were made prisoners, their watches taken from their pockets, or their money from their purses? No such case can be produced, and the judge would be considered as having a *furor* for condemnation, who should establish the precedent. Whether or not gold and silver are to be considered as merchandise in regard to the laws of war, will depend on the purposes for which they are shipped. If sent for the purpose of paying a debt, or for the purpose of purchasing merchandise, they may well be considered as cargo; but if carried by a man who is emigrating to a foreign country or returning to his own, and used as the means of taking his property along with him, they cannot be considered as cargo. Every case of this kind must depend on the circumstances which surround it. Guillem leaving Mexico with his wife and children, ignorant of commerce and not confiding in the engagements of merchants, and perhaps unable to procure them, carried with him his small fortune, in the only shape and form of money with which he was familiar. Is there no difference between money carried as the personal property of the passenger, and money shipped for the ordinary purposes of commerce? If this distinction be made, it is impossible to understand how the three thousand dollars of gold and silver carried by Guillem, one half of it on his person, can be condemned as the cargo of La Jeune Nelly.

Fourth Point. The statement of this point carries its own argument with it. If the blockade was raised for the purpose of permitting neutrals to go on board of the neutral ships of war, it is to be supposed they would be permitted to carry their clothes, personal effects, baggage, and money with them. We must suppose that they could have gone to the neutral ships of war either in cutters or other small craft of those vessels, or in Mexican craft. It was to be supposed that General Scott and Commodore Perry were in good faith in giving this permission, and in raising the blockade for the escape of neutrals, and so long as neutrals took advantage of this permission in good faith, and did not attempt to cover Mexican property, our courts would respect and enforce the rights thus conferred. The libel in the present case is said to be for the benefit of the officers and men of the vessels of the squadron in the Gulf of Mexico. This squadron was commanded by Commodore Perry, and neither he, his officers, nor men will be allowed to profit by the breach of the permission thus given to neutrals to with-

draw themselves. When once on board of the neutral ships of war, the neutrals are at liberty to go where they please; whether the raising of the blockade extended to La Jeune Nelly or not, is a question which remains to be settled between the governments; but it is presumed that the courts will compel respect to such a permission given by the commander of the naval and land forces of the United States. In every point of view, therefore, in which the case can be considered, it is believed that this court will affirm the judgment of the Circuit Court, and will decree that the costs be paid out of that part of the property seized which was condemned.

Mr. Chief Justice TANEY delivered the opinion of the court.

There is no dispute about the material facts in this case. The claimant was a citizen of France who had been domiciled in Mexico about three years, following the occupation of a cook in a hotel, and was returning with his family to reside in his own country when the capture was made. They sailed from Vera Cruz in a French vessel bound to Havre. The money he had with him, and which is now in question, was not shipped as cargo, or for the purposes of trade. It amounted to only two thousand eight hundred and sixty dollars; and was the earnings of his industry in Mexico, and taken with him for the support of himself and his family upon their return to France. The hostile character which his domicile in Mexico had impressed upon him and his property had therefore been thrown off; and as soon as he sailed from Vera Cruz he resumed the character of a French citizen, and as such was entitled to the rights and privileges of a neutral, in regard to his property, as well as in his person. The rights of the neutral in this respect have always been recognized in the prize courts of England, and were sanctioned by this court in the case of the Venus, 8 Cranch, 280, 281. Indeed, we do not understand that the appellants claim to have this money condemned upon the ground that it was liable to be treated as the property of an enemy, on account of the previous domicile of Guillem. But it is insisted that, if it is regarded as the property of a neutral, it was shipped in violation of the blockade; and that the character of the vessel in which it was found also subjects it to condemnation.

So far as concerns the breach of blockade, the attempt to pass out of the port with this money was not of itself an offence, apart from the vessel in which he sailed. The blockade had been opened for the purpose of enabling consuls and other neutrals to pass out to their respective ships of war, soon after General Scott landed and invested the town. And it continued open for that purpose until the 22d of March. It is

true that the permission was confined to ships of war. But the reason is obvious. They were the only vessels that could be safely allowed to communicate with the town then closely besieged. And the permission was restricted to them, because it was believed that commanders of national vessels would not suffer a privilege granted to neutrals from motives of humanity to be used for improper purposes.

But the object and intention of this order were evidently, not merely to enable the neutral to avoid the hazards of the approaching bombardment, but to afford him an opportunity to leave the enemy's country, and return to his own, if he desired to do so. The neutral was not required or expected to remain on board the ship of war. The permission opened to him a path by which he might escape altogether from a country about to be visited with the calamities of war. It therefore necessarily carried with it the permission to take with him the means of supporting himself and his family, on their voyage home and after their return. The order contains no restriction upon this subject, and to imply any would be inconsistent with the motive by which it was evidently dictated. The Jeune Nelly, in which the claimant embarked, sailed on the 19th of March, while the blockade was still open for the purposes above mentioned. It was no breach of the blockade, therefore, for the claimant to pass out of the town at that time on his voyage home, and to take with him the sum of money his industry had accumulated, and which was necessary for the support of himself and his family on their arrival in their own country. The port was not then closed against the egress of neutrals from the hostile country; nor were they forbidden to take with them the money necessary for their support. And if Guillem had gone on board a French ship of war for the purpose of returning home, and taken with him this small sum of money, his right to do so could not be questioned.

But it is supposed that the character of the vessel in which he embarked subjects his property to forfeiture. La Jeune Nelly had entered the port in violation of the blockade; and endeavored to break it a second time by leaving the port without permission. She was undoubtedly liable to capture and condemnation. But it does not by any means follow, that the property of the claimant is implicated in the guilt of the vessel, or must share in the punishment. There is no evidence to show that he had knowledge of the previous breach of blockade, or of the intention to break it again in going out. She was a neutral vessel belonging to his own country, and had come into the port in open day under the French flag; and she sailed again in a manner equally open, and without any

apparent design of concealing her movements from the blockading squadron. The permission granted by the American commanders had as a matter of course been made public in Vera Cruz; and Guillem must without doubt have seen citizens of neutral nations daily leaving the city for the ships of war, and taking with them the necessary means of support for themselves and their families. He appears to have done nothing more than avail himself of the most convenient opportunity that offered in order to accomplish the same object; and if he did not participate in the design of breaking the blockade, his property is not affected by the misconduct of the vessel in which it was shipped. Even in the case of cargo shipped as a mercantile adventure, and found on board of a vessel liable to condemnation for a breach of blockade, although it is *primâ facie* involved in the offence of the vessel, yet, if the owner can show that he did not participate in the offence, his property is not liable to forfeiture. This is the rule as stated by Sir William Scott in the case of the Alexander, 4 Rob. 93, and in the case of the Exchange, 1 Edwards, 39, and recognized in 1 Kent's Com. 151. And yet, in the case of a cargo shipped for the purposes of commerce, the breach of blockade is almost always committed by the vessel for the benefit of the cargo, and to carry out some mercantile speculation injurious to the rights of the belligerent nation whose ships are blockading the port. The case before us is a stronger one in favor of the claimant than that of the innocent owner of a cargo. The money in question was not shipped as cargo or as a mercantile adventure. Guillem was a passenger on board, with his whole family, and the money was a part of his personal effects necessary for their support and comfort. The shipment of the money could give no aid or comfort to the enemy. And in taking his passage in the Jeune Nelly, his intention, as far as it can be ascertained from the testimony, was merely to return to his own country, in a mode better suited to his humble circumstances and more convenient to his family, than by passing through the ships of war. In the opinion of the court, the money he took with him was not liable to condemnation on account of the guilt of the vessel, and the decree of the Circuit Court is therefore affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed.

THE UNITED STATES, APPELLANTS, *v.* ETIENNE ALPHONSO BOISDORÉ, LAURENT BOISDORÉ, SIDNEY BOISDORÉ, MATHILDE AND ALERINE NICOLAS, WIDOW OF MANUEL FABRE DANONY, CAROLINE NICOLAS, ELISE NICOLAS, JOSEPH MANUEL DE LABARRE, DELPHINE VICTOIRE DE LABARRE REAL AND HER HUSBAND CHRISTOVAL REAL, LOUIS DEJEAN, ANTOINE BOISDORÉ, AND MANATTE DEJEAN PARDON AND HER HUSBAND VINCENTE PARDON, HEIRS OF LOUIS BOISDORÉ, DECEASED.

In adjudicating upon an imperfect title under a Spanish concession, this court again adopts the rule laid down in 10 Peters, 330, 331; viz. Can a court of equity, according to its rules and the laws of Spain, consider the conscience of the king so affected by the acts of his lawful authorities in the province, that he became a trustee for the claimant, and held the land claimed by an equity upon it, amounting to a severance of so much from the public domain, before and at the time the country was ceded to the United States?

This rule, applied to the following case, brings out the results stated below.

In 1783, in consequence of a memorial from Boisdoré, Miro, the acting Governor of Louisiana, issued the following order to Trudeau, the Surveyor-General, viz.:

"Don Carlos Laveau Trudeau will establish Louis Boisdoré upon the extent of ground which he solicits in the preceding memorial, situated in the section of country commonly called Achoucoupoulous, commencing in front from the plantation belonging to Philip Sancier, a resident of said country, down to the bayou called Mosquito Village Bayou, with the depth down to Pearl River; the same being vacant, and no prejudice being caused to the neighbors living as well in front as upon the depth; which measures he will reduce to writing, signing with the aforesaid parties, and will remit the same to me, in order that I may furnish the party interested with a corresponding title in due form."

Boisdoré, in his memorial, had stated that he wished to form an establishment for the whole of his numerous family, on which he might employ all his negroes, and support a large stock of cattle which would be useful to the neighboring city.

The grantee took only a trifling possession of the land by placing a single slave there, and Trudeau never made, nor attempted to make, a survey. In 1808 the Spanish Governor of Florida gave directions to the Surveyor-General of Florida, who drew a figurative plan of a survey, but the Governor of Florida at that time had no jurisdiction over the land.

If Trudeau had made a survey and returned a certificate, it would have been binding, although it might not have conformed strictly to the lines of the original grant. But the description of the tract is so vague and uncertain, that it cannot now be surveyed by an order of the court. The mode directed by the District Court would include four hundred thousand acres; and it is unreasonable to suppose that the conscience of the king of Spain would have been bound to confirm such a grant, when the grantee neglected to fulfil the obligations which were incumbent upon him.

Besides, there being no given point from which to commence the survey, or to establish the second corner, if the court were to order the mode in which the survey was to be made, it would not be a judicial decree, but an exercise of political jurisdiction.

THIS was an appeal from the District Court of the United States for the Southern District of Mississippi.

The case arose under the act of 26th May, 1824 (4 Stat. at Large, 52), as revived and reënacted by the act of June 17, 1844 (5 Stat. at Large, 676). A petition was presented to the District Court of the United States for the Southern District of Mississippi, by the heirs of Louis Boisdoré, claiming a large

tract of land lying between the Bay of St. Louis and Pearl River, in the State of Mississippi, and below the thirty-first degree of north latitude.

The circumstances were these.

On the 1st of April, 1783, Louis Boisdoré presented the following application to Miro, the acting Governor-General of Louisiana.

"Señor Governor-General:—I, Louis Boisdoré, a citizen of this city, do, with due respect, present myself to your Excellency and say, that, wishing to form an establishment and cow-house (cattle-raising farm) in the vicinity of the Bay of St. Louis, in the place commonly called Achoucoupoulous, for all my family, which is very considerable, as is well known to your Excellency; and moreover, for the purpose of employing all my negroes on it, and keeping a considerable stock of cattle which I have already on the place, the place being almost uninhabitable, only fit for a *vaqueria* (cattle-raising farm): May it please your Excellency, in consideration of what is above explained, and of the benefit that will result to the capital (city) from such a considerable cattle-raising establishment as the one which I have commenced to form in the said place, and in the vicinity of said city, to grant to me the portion of ground which is vacant in the said place (section of country), known under the name of Achoucoupoulous, running from the plantation of Philip Saucier up to the bayou called Bayou of Mosquito Village, formerly inhabited by Mr. (paper torn off), and running in depth down to Pearl River, in order that I may form with facility the aforesaid establishment and cow-house (cattle-raising farm) for all my family as aforesaid; a favor which I hope, according to justice, from the granting power which is vested in you.

"*New Orleans*, 1*st April*, 1783.

(Signed,) L. Boisdoré."

Upon which application, the Governor-General issued the following, viz.:—

"*New Orleans*, 26*th April*, 1783.

"Considering the sufficient reasons explained to me above, and having regard to the advantage and utility which will result to the capital from the establishment of a cow-pen (*vaqueria*) in that section of the country, little suited to any kind of culture, the surveyor of the province, Don Carlos Laveau Trudeau, will establish Don Louis Boisdoré on the tract of land which he solicits in the preceding memorial, situated in the section of country commonly called Achoucoupoulous, taking

as the front from the plantation of Philip Saucier, a resident of said section of country, to the bayou called the Bayou of the Village of Maringouins, with a depth unto Pearl River, it being vacant, and causing no prejudice to the neighboring inhabitants, as well in front as in depth; which proceedings he will extend in continuation, sign and forward to me, with the preceding, that I may furnish the party interested a title in due form.

"MIRO."

In 1808, Boisdoré having died, his widow authorized Don Gilbert Guillemard, a lieutenant-colonel in the army, to obtain an order for a survey from Morales, then in Pensacola. In the petition Guillemard recites as follows: "And although, at that period, on account of the multifarious occupations which engrossed the attention of Charles Laveau Trudeau, the surveyor, in relation to the admeasurement and survey of lands of value, and on account of the great expense to be incurred previously, he did not proceed to the admeasurement and marking out the boundaries of said tract of land, but notwithstanding transported and conveyed thither a large stock of cattle, and placed thereon a stock-keeper, named Augustus Mallet, who remains on to the present day, to preserve the right of property in himself, which the said Boisdoré in his lifetime possessed," &c.

This petition was referred to the fiscal minister of the royal treasury, who, on the 7th of April, 1808, ordered the Surveyor-General to make out a map and certificate of survey to be returned to him.

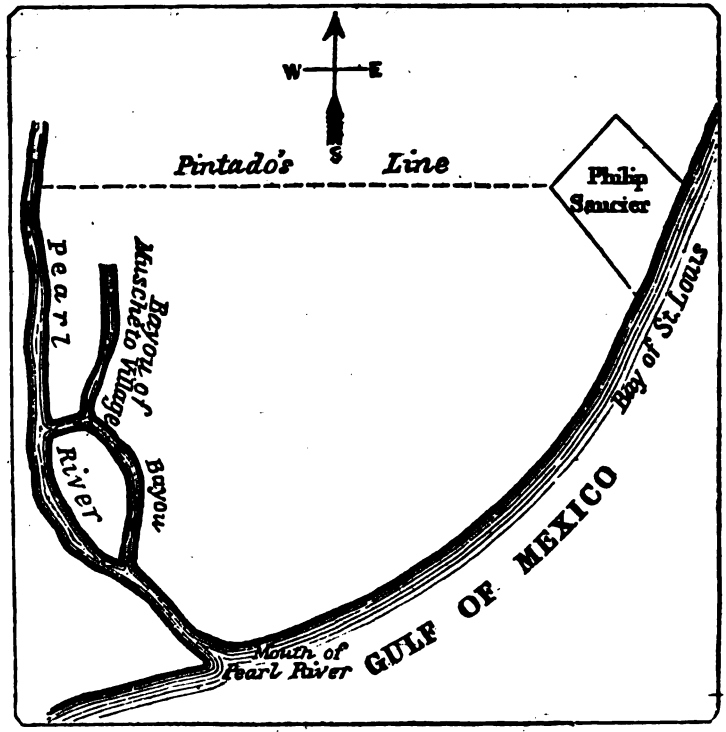
On the 23d of May, 1810, Pintado addressed a letter of instructions to a deputy surveyor, instructing him to lay down the lines of the grant as follows: —

The demand of M. S. Boisdoré, senior, is conceived in a manner a little confused in regard to the place, for he says in his memorandum of the 1st of April, 1783, that the land which he claims is on a place called Achoucoupoulous, commencing from Philip Saucier's plantation, as far as the bayou called the Mosquito Village, formerly inhabited by Madam Susser, extending back to Pearl River. This description causes sufficient embarrassment in determining the form or figure which the land ought to have; however, as he calls the front the distance from Saucier's plantation to the Bayou of Mosquito Village, the depth, as far as Pearl River, can be understood only by two lines drawn from the said last two points, so as to strike the said Pearl River; that is to say, the easternmost of the three which take this name; and these lines ought natural-

ly to run to the west, one from Saucier's plantation, and the other from Mosquito Village. The little sketch (*crouquis*) annexed will give you a clearer idea. Though there is no geometrical precision, it approaches, notwithstanding, to the figure of the place. You will send it back to me when you have finished the business," &c.

On the 30th of May, 1810, Pintado, the Surveyor-General, returned a certificate, with a map. In the certificate he says that "the map represents and shows the tract of land, with the shape, figure, and extent, and the boundaries, bounds, and confines, natural and artificial, which should serve for limits," and then refers to a more particular map to be made hereafter by any one of his deputies, or by any other person, "so that the northern boundary shall be bounded by lands belonging to the king, on the south by the bank of the sea, on the east by the same and a part of the Bay of St. Louis, and on the west by the above-mentioned Pearl River."

In order to understand the argument and decision, it will be necessary to insert a sketch of this map.



Under the act of Congress passed on the 25th of April, 1812 (1 Land Laws, 208), this claim was presented to the commissioner appointed for the district east of Pearl River. Mr. Crawford, the commissioner, reported that the land was not cultivated, and not inhabited.

Under the act of Congress passed on the 3d of March, 1819 (1 Land Laws, 316), the claim was again presented to the register and receiver of the land-office at Jackson Court-House, who made the following special report:—

"No. 2. This claim is founded on an order of survey issued by Governor Miro in favor of Louis Boisdoré, confirmed to his widow, Marguerite Doussin, by the Intendant Morales, 4th April, 1808. Although a map or conjectural plan of the limits of the above claim, made by the Surveyor-General, Pintado, the 30th of May, 1810, accompanies the title papers, yet it does not appear to be the result of an actual survey, nor to have been made with geometrical precision, but merely intended for the direction of such persons as might be employed to make the survey. No survey appears to have been made. This claim extends from the Bay of St. Louis to the mouth of Pearl River, and is supposed to contain several hundred thousand acres.

"Land-office, Jackson Court-House, July 11th, 1820.

(Signed,) WILLIAM BARTON, *Register.*
WILLIAM BARNETT, *Receiver.*

"Attest: JOHN ELLIOT, *Clerk.*"

Under the act of the 24th of May, 1828 (1 Land Laws, 445), this claim was again presented to the register and receiver at Jackson Court-House. All the documents were submitted to this board, together with the depositions of sundry persons, showing the genuineness of the signatures of the Spanish officers, the locality of the land, and its possession.

The commissioners made the following report:—

"*Remarks.*

"Claim No. 4. This claim is founded on an order of survey issued by Governor Miro, in favor of Louis Boisdoré, and confirmed to his widow, Marguerite Doussin, by the Intendant Morales, 4th April, 1808. It does not appear by the title papers that an actual survey was made with geometrical precision; yet a map, or conjectural plan, definitely fixing the limits of the claim, was made by the Surveyor-General, Pintado, the 30th of May, 1810. This claim extends from Pearl River to the Bay of St. Louis, and is supposed to contain about one hundred thousand acres.

"The additional testimony adduced to us proves incontestably that this claim has been inhabited, and a part of the land kept under cultivation, upwards of forty years. It is also in testimony before us, that the extent of this claim was distinctly known to the neighbors, and that the claimant set up his claim to the whole limits contained within the before-mentioned figurative plan. The above claim is forfeited under the Spanish laws, usages, and customs, for want of inhabitation and cultivation within the time prescribed by those laws and regulations. Yet, as the inhabitation and cultivation appear to be very ancient, it is conceived that this claim ought to be confirmed for a reasonable quantity.

(Signed,) WILLIAM HOWZE, *Register.*
G. B. DAMERON, *Receiver.*

"Attest:
(Signed,) VALENTINE DELMAS, *Clerk.*"

By an act of the 28th of May, 1830 (1 Land Laws, 468), certain of the claims reported by the above-named register and receiver were confirmed, and the act has this special provision respecting the claim in controversy: "And provided, also, that the claim of the representatives of Louis Boisdoré, numbered four, in report numbered three, shall not be confirmed to more than twelve hundred and eighty acres."

Under this act, a certificate was issued, and a survey made, of the twelve hundred and eighty acres, by Elihu Carver, a deputy surveyor, on the 6th of November, 1830, which was approved by the Surveyor-General south of Tennessee, on the 11th of August, 1832.

The act of Congress, passed in 1844, reviving and reënacting the law of 1824, has been already referred to, in the opening of this statement.

On the 1st of February, 1845, the heirs of Boisdoré presented a petition to the District Court of the United States, which petition was afterwards amended in November, 1845. This amended petition disregarded the figurative plan of Pintado, and claimed that "the form and extent of their grant, to which, by the manifest and only reasonable construction of their concession, they are entitled, is that which would result and be produced by regarding as a base an assumed straight line between the two points called for as the front of the grant; viz. from the beginning point, at the north side of Philip Saucier's plantation, to the Bayou of the Mosquito Village; and thence, by two parallel perpendicular lines, extended from each extremity of said base or front line, till each side line in its extension intersected the Pearl River."

They aver that their title was protected and secured by the treaty of St. Ildefonso of October, 1800, and by the treaty of Louisiana of 1803, and by the laws of nations, and would, by the laws of Spain and the laws of France, have been perfected into a complete title, had not the sovereignty of the country been transferred to the United States.

They aver that their ancestor, the said Louis Boisdoré, and themselves, and their agents and representatives, have asserted their right of ownership, and maintained possession by actual inhabitation and cultivation of part of said land in behalf of the whole, from 1783 to the present time, and kept up a large herd of cattle and a grazing establishment on said land from the date of the grant until many years after the jurisdiction of the Spanish government had been superseded by that of the United States.

To this petition the District Attorney for the United States demurred, but the demurrer was overruled, and he then filed an answer.

The answer of the United States in substance denies that the concession or order of survey conveyed any title whatever, but insists that it is void for uncertainty, and that nothing was ever done, during the existence of the Spanish authority in the territory, to perfect it. It denies any authority in Morales to do what he is alleged to have done. It denies that Louis Boisdoré maintained possession by actual habitation and cultivation, as alleged in the petition, from 1783; and insists that, for want of such inhabitation, settlement, and cultivation, the claim, if it ever had any existence, was forfeited by the laws, usages, and customs of the Spanish government. The United States admit that the claim was presented to several boards of commissioners, but deny that the petitioners, or those representing them, ever complied fully with the acts of Congress, or presented any sufficient and competent evidence of title, or any evidence which would justify a favorable report. That the act of the 28th of May, 1830, provides that it shall not be confirmed to more than twelve hundred and eighty acres, and they rely on that act as a final and complete rejection of the claim, and as such final action upon it by the government of the United States, that the court has no jurisdiction to try it. They admit that they have caused the land to be surveyed, and have granted and sold large portions thereof, and that the settlers and purchasers are now in possession, and they are necessarily parties to the suit. They do not admit that the original Spanish documents and title papers were translated and recorded as required by law, but require full and legal proof. They deny that the claim is protected by the treaties of

1800 and 1803, or by the law of nations, or that it would or ought to have been perfected into a complete title if the sovereignty of the country had not changed. They insist that the concession was conditional, and that the grantee should have occupied and possessed within and for a limited time, and should have established without delay, or within a reasonable time, a cow-pen, for the public benefit; and that a survey should have been made within a reasonable time, and made a part of the public records, so that the public might know what land, if any, was to be separated from the public domain; and say that none of these requisites were complied with, and that the claim was forfeited according to the Spanish laws, customs, and usages. They further answering say, that they have been informed, and charge the truth to be, that the petitioners accepted the donation of twelve hundred and eighty acres, for which Congress confirmed their claim by the act of 1830, and it is now too late for them to disclaim the same; that it was surveyed for them by Elihu Carver, a deputy surveyor, and his survey approved by the Surveyor-General south of Tennessee; and submit that such acceptance of the twelve hundred and eighty acres is a complete extinguishment of their claim or right to any greater quantity; but whether accepted or not, they insist that the act of 1830 was such a final action of the government of the United States as deprives the court of jurisdiction.

A great number of depositions were taken on both sides. Those on the part of the claimants were intended chiefly to prove the genuineness of the documents, the heirship of the claimants, and the locality and possession of the land. The deposition of Bringier, Surveyor-General of Louisiana, was also taken as to the practicability of locating the grant, who concurred with Pintado in his instructions of the 23d of May, 1810, and answered as follows:—

"In answer to the third interrogatory deponent says: In the case stated, I should first survey the front from point to point, and then run back two lines perpendicular to the front, and parallel to each other, to the natural boundary in the rear."

On the part of the United States the depositions (amongst others) of Ludlow and Downing were taken. These persons had both been surveyors-general in Mississippi, and testified as follows.

Mr. Ludlow said:—

"Answer to interrogatory second: I have examined the order of survey of Governor Miro to Louis Boisdoré, dated April 26th, 1783, and believe the survey to be practicable, provided the plantation of Philip Saucier and the Bayou of Mosquito

Village can be identified; and believe the survey should be made by finding a straight line between the above-mentioned points and raising perpendiculars upon said line, at its extremities, extending back to Pearl River; provided there are no controlling circumstances to give direction to the side lines, such as adjoining claims, &c. The instructions of the Surveyor-General Pintado are clearly erroneous, as they, if followed, would give no side line on the west."

Mr. Downing said: —

"Answer to second interrogatory: The phrase in the grant to Louis Boisdoré, 'the front thereof to commence from the plantation of Philip Saucier,' 'and running to the Bayou of the Mosquito Village,' is not sufficiently definite to enable a surveyor to fix upon a beginning point or corner; both the beginning point and the front line seem to be left to the discretion of the surveyor, and it is questionable whether any two surveyors would settle upon the same point for a beginning. I certainly could not adopt the views of Pintado, the Spanish Surveyor-General, for, in the diagram filed in this case, and to which he refers in his instructions, he places what should be the most eastwardly front corner on the back line of the Saucier plantation; this seems to be his understanding of the word *from*, in the grant. A line from this point to the mouth of the Bayou of Mosquito Village would form a base, from each end of which the side lines should run at right angles; or, in other words, the side lines of a Spanish grant, when the course or quantity is not given or particularly specified, shall run 'as near as practicable' at right angles from the front or shore. This has been the practice on bayous and rivers, as well as on the sea-shore. In the present case, a line run from the mouth of the Bayou of the Mosquito Village, at right angles from a base line between the front corners, would apparently, for several miles, range close along and parallel with the east margin of Pearl River, and consequently conflict with the uniform practice of the location and survey of grants upon all navigable streams and shores. Upon the whole, I think the calls of the grant in question so indefinite that no two surveyors, having regard to the usages governing in surveys of Spanish grants, would coincide in the survey of it as to form, quantity," &c.

In November, 1847, the cause came on for trial in the District Court, when a decree was passed, confirming the title of the claimants, and directing the survey to be made as follows: —

"And it is further adjudged and decreed, that the tract of land, whereof title is so hereby confirmed, shall be surveyed and bounded as follows, namely: having its beginning corner

at that point on the sea-shore, at the entrance of the Bay of St. Louis, where the southeast corner of Joseph and Martial Nicaise's claim, formerly the claim of Philip Saucier, has been established by the survey made thereof by authority of the United States, as approved and recorded; thence southwestwardly, by the meanders of the sea-shore, to the mouth of East Pearl River; thence up said river to the point on the northeast side where the easternmost mouth of the Bayou Maringouin, otherwise called Mulatto Bayou, intersects and empties into the said Pearl River, and which mouth, so here intended to be described, is identical with that sometimes called the lower mouth of the Pearl River cut-off, and which point shall constitute the second front corner of the claim. From one of these front corners to the other, in a direct course, shall be drawn a theoretic base line, and from each extremity of said base line, and perpendicular thereto, shall be projected the side lines of said claim, to be laid down in a direct course and parallel to each other, till each, respectively, shall intersect the Pearl River, between which two points of intersection the meanders of Pearl River shall constitute the conjunction line of said survey. And it is further ordered, that the surveyor who shall execute the boundary hereby directed shall note and report all intersections of the side lines with the public surveys of the United States heretofore extended over said land; and especially note and show the form and extent of all interfering private claims held adversely to the petitioners, under grant or authority of the United States, which may be found upon said side lines and projecting into said claim, as well as every other such adverse claims as lie wholly within said survey.

"It is further adjudged and decreed, that all such adverse claims and parts of claims as aforesaid, so found within the survey hereby directed, shall be, and the same are hereby, exempted from the operation of this decree, so far as effects their validity; but in place and stead of the lands included in such claims, the petitioners are hereby adjudged to have right and claim to a like quantity of lands from out of the public domain, as by law in such case is provided.

(Signed,) S. J. Gholson."

From this decree the United States appealed to this court.

The case was argued by *Mr. Crittenden* (Attorney-General), for the United States, and by *Mr. Volney E. Howard*, with whom was *Mr. Henderson*, for the appellees.

Mr. Crittenden made the following points:—

I. That the proceedings of the Spanish authorities of Pen-

sacola in 1808 and 1810, relative to the confirmation and survey of the lands in the concession to Boisdoré, were null and void, the Spanish government having then no authority over that part of the country, the same being embraced within the limits of the cession of Louisiana by Spain to France, and by the latter to the United States. § 14 of Act of 26th March, 1804, erecting Louisiana into two territories (1 Land Laws, 114); Foster and Elam *v.* Neilson, 2 Pet. 254; Lee *v.* Garcia, 12 Pet. 511; United States *v.* Reynes, 9 How. 127.

II. That the concession by Governor Miro to Louis Boisdoré is void, because no land was severed from the public domain by a survey giving it a certain location previous to the treaty of cession, and the description in it is so vague, indefinite, and uncertain, that no location can be given to the land. United States *v.* Miranda, 16 Pet. 156, 160; 15 Pet. 184, 215, 275, 319; 10 Pet. 331; 3 How. 787; 5 How. 26.

Upon looking at the maps in the record, it will be seen that the plantation of Philip Saucier, now belonging to Joseph and Martial Nicaise, is on the Bay of St. Louis, and the first call in the concession is to commence from that plantation. But from what side or part of it, or from what particular or specific point, is not stated. Pintado's figurative map commences it in the rear of Saucier's plantation, at the northwest corner; while the claimants and the court below commence it on the sea-shore of the Bay of St. Louis, at exactly the contrary point, — the southeast corner. The decree says, "having its beginning corner at that point on the sea-shore, at the entrance of the Bay of St. Louis, where the southeast corner of Joseph and Martial Nicaise's claim, formerly the claim of Philip Saucier, has been established by the survey made thereof by authority of the United States." There is then no specific starting-point under the first call of the concession; and the second call is equally vague and indefinite.

Boisdoré and his heirs, from 1783 to 1800, during which the country remained under the dominion of Spain, seventeen years, had no survey made by which the location of the lands intended to be conceded could be identified; and shall it be left to them now to choose a point for the beginning of a survey, or can the court arbitrarily fix upon such a point? There is certainly no call in the concession to commence on the Bay of St. Louis, as has been decreed by the court below, and there is therefore no water boundary in the case. Pintado knew better than to commence on the Bay of St. Louis; for, while he speaks in his letter to Lorrens of the confusion and embarrassment of the description, he keeps so far as he can guess to

the calls of the concession, as to commence from one of the rear corners of Saucier's plantation.

The next call is the Bayou of Maringouins, or Mosquito Village, nearly due west from the Bay of St. Louis, in the direction of Pearl River, but short of it. There is no specific point fixed on the bayou, which, according to the evidence in the case, is from seven to nine miles in length, and navigable for vessels used in the lake trade. Is the mouth or the head intended, or what intermediate point? Monet, one of the witnesses for the claimants, says the head. In answer to the fourth interrogatory for the claimants, he says: "The head of which (bayou) makes one of the corners designated in the title papers of said claim." Others think it should be the mouth, as decreed by the court.

The decree of the District Court, commencing on the Bay of St. Louis, below Saucier's plantation, gives to the claimants, from this point, all around the coast of the sea-shore to the mouth of East Pearl River, thence up that river to the eastern-most mouth of the bayou, which it fixes as the second call of the concession. Now, with respect to the line thus decreed to be run round the sea-coast, the concession is not only vague and uncertain, but there does not appear to be any call whatever in it which sanctions such a construction, or gives it the slightest countenance. The decree then directs that, between the corner thus fixed on the bayou, and the corner on the Bay of St. Louis, a theoretic base line shall be drawn, and from each of its extremities, and perpendicular to it, there shall be drawn, parallel to each other, two side lines, to run until they strike Pearl River, between which lines the meanders of the river shall constitute the conjunction line of the survey. This theoretic base line is about fifteen miles in length.

It will be observed, from the maps of the country, that the line from the mouth of the bayou will run nearly parallel to Pearl River, and strike it about ten miles from its mouth; and that the other line, commencing on the Bay of St. Louis, will strike it at least fifty miles above, and both may, on an actual survey, go beyond even these distances. The last-mentioned line, it will be remembered, is by the concession declared to commence from the plantation of Philip Saucier; but so far from the line fixed by the court below commencing on the southeast corner of that plantation being in consistency with the calls of the concession, it actually cuts off the greater part of Saucier's plantation. In fact, these lines run up, instead of back to the river. Pintado, in his letter before mentioned, had a juster notion of what "approached" to the calls of the concession. He says, "This description causes sufficient embar-

rassment in determining the form or figure which the land ought to have; however, as he calls the front the distance from Saucier's plantation to the Bayou of Mosquito Village, the depth, as far as Pearl River, can be understood only by two lines drawn from the said last two points, so as to strike the said Pearl River; that is to say, the easternmost of the three which take this name; and these lines ought naturally to run to the west, one from Saucier's plantation, and the other from Mosquito Village. The little sketch annexed will give you a clearer idea. Though there is no geometrical precision, it approaches to the figure of the place." Boisdoré himself never dreamed of such a magnificent principality for his cow-pen as is claimed by the petitioners, and given by the decree of the court below. See the testimony of Rochon and Benite, filed by the claimants before the second board of commissioners.

The locality, then, of the land not being ascertained, either by the concession or a survey, was not acknowledged by the authorities of Spain, and no effort was made to identify it before the treaty of cession. Nothing was done to withdraw the land intended to be granted from the mass of the public domain, or to show what it was that was to be withdrawn. It therefore remained in Spain at the time of the cession to France, and passed to the United States by the cession of France to them.

III. That the concession was only an incipient step towards a title depending upon the establishing of a cow-pen by Boisdoré within a reasonable time, and after being put in possession of the land, and of a survey being made and returned to the Governor, so that it might be known what land was severed from the public domain; and that none of these being done, there was no just or valid claim on the Spanish government to make a perfect title, and of course none on the United States.

The act of 1824, in describing the claims which might be prosecuted under it, says, *inter alia*, they are such as "might have been perfected into a complete title under, and in conformity to, the laws, usages, and customs of the government under which the same originated, had not the sovereignty of the country been transferred to the United States."

The considerations which induced Governor Miro to make this gratuitous concession are set forth in it. "Considering the sufficient reasons explained to me above, and having regard to the advantage and utility which will result to the capital from the establishment of a cow-pen." The importance which was attached by the Spanish government to the raising of cattle, is shown in the royal regulation of 1754 (2 White's Recop. 62), and in the Recopilacion of the Laws of the Indies,

49 and 50, No. 74 and 76. And by the same laws it was required that the grantees should take actual possession within three months. Ibid. 51, No. 81. See also the second and third articles of O'Reilly's regulations made in 1770, which were in force in Louisiana at the date of this concession. Ibid. 229.

In this case, the concession directs the Surveyor-General to establish Boisdoré on the land, and to forward his, the Surveyor-General's, proceedings to the Governor, that a title in form might be furnished to Boisdoré. This was never done, and no legal survey was ever made.

The twelfth article of O'Reilly's regulations, above referred to, is as follows: "All grants shall be made in the name of the king, by the Governor-General of the Province, who will at the same time appoint a surveyor to fix the bounds thereof, both in front and depth, in presence of the judge ordinary of the district, and of two adjoining settlers, who shall be present at the survey; the above-mentioned four persons shall sign the proces verbal which shall be made thereof, and the surveyor shall make three copies of the same, one of which shall be deposited in the office of the scrivener of the government, another shall be delivered to the Governor-General, and the third to the proprietor, to be annexed to the titles of his grant." The directions of the concession are in accordance with this regulation, and they are evidently made with reference to it. It furnishes the best criterion of what had to be done by Boisdoré before his grant could be perfected.

Suppose that Boisdoré or his heirs had applied to the Spanish authorities in 1800, seventeen years after the date of the concession to him, without proof that he had occupied the land for the purposes mentioned in the concession for the first five years after date (the earliest occupation in evidence is 1788), or that he had been put in possession, and without any survey or other identification of the land, there was no obligation on them to perfect the title. 10 Peters, 331. The claimants themselves show this, by their own statements, in their application to Morales in 1808.

IV. That the proviso of the act of 1830, declaring that this claim "shall not be confirmed to more than twelve hundred and eighty acres," prevents the recovery sought in this case; and that the said twelve hundred and eighty acres were in full satisfaction of the claim, and were accepted and surveyed for the benefit of those claiming under the petitioners.

In the clause of the act of 1824 conferring jurisdiction on the court, it is declared that the several acts of Congress on the subject of these claims are to be taken into consideration by

the court in deciding on them. This proviso, therefore, standing unrepealed, is the declared will of Congress that this claim shall not be confirmed for more than is stated. All claims under incomplete titles in the country acquired from France by the treaty of 1803 addressed themselves to the political power, and Congress had a right to confirm part of a claim, and refuse confirmation for the residue, if they supposed it just to do so. 3 How. 788.

In the case of The United States *v.* Reynes, the court gave effect to the act of 1804, which declares that all grants in Louisiana subsequent to the treaty of St. Ildefonso are null and void. That the quantity of land given was intended as a full satisfaction is apparent from the words employed. On the 6th of November, 1830, the twelve hundred and eighty acres were surveyed, and the plat and survey approved 11th August, 1832. This rendered the title complete, for the act does not direct patents to issue. It will be seen from the testimony of Carver, Monet, and Daniel, that the twelve hundred and eighty acres cover the plantation of Francis Saucier and part of that of Daniel, who were purchasers under Boisdoré's heirs. On the question arising on this point, see 3 How. 788.

V. That on the 26th of April, 1783, the date of the concession by Governor Miro to Louis Boisdoré, the authorities of Spain had no power to make grants in that part of the country where the lands lie, the cession by Great Britain to Spain not having been made until the definitive treaty of peace of the 3d of September, 1783. 1 Kent's Com. 169; Wheaton's Elements of International Law, 572; Clark *v.* United States, 3 Wash. 104; United States *v.* Hayward, 2 Gal. 501; Poole *v.* Fleeger, 11 Peters, 210; Polk's Lessee *v.* Wendell, 9 Cranch, 99; and the cases of Foster *v.* Neilson, Garcia *v.* Lee, and United States *v.* Reynes, cited under the first point.

VI. That there was no sufficient evidence of the execution of the concession by Governor Miro; and that the proof offered in the shape of *ex parte* affidavits, supposed to have been before the several boards of commissioners, was not competent.

VII. That the petitioners should have made parties to this suit persons claiming the lands, or any portion of them, under a different title, or holding possession otherwise than under them; and the demurrer ought to have been sustained.

The act of 1824 directs such persons to be made parties. By the second section of the act of 24th May, 1828, to continue in force for a limited time, and to amend, the act of 1824 (1 Land Laws, 442), so much of the last-mentioned act as required claimants to make adverse parties to the suit, or to show the court what adverse claimants there might be on the land,

was repealed. It is said that the act of 1844 revived the act of 1824 as amended by that of 1828. That, however, must depend upon the intention of Congress, to be gathered from the language of the act itself. It refers to the act of 1824 by its name, reciting both its date and title. It does not revive the whole of its provisions, but expressly excludes all such portions of said act as referred to the Territory of Arkansas. Here is a special reference to this act only, in a form of expression as clear and perspicuous as can be employed. Again, it says, "and the provisions of that part of the aforesaid act hereby revived." What is still more conclusive and decisive is the following provision, viz.: "as if these States had been enumerated in the original act hereby revived." The act of 1824 is not only declared to be revived, but reënacted, excluding all such portions of said act as referred to the Territory of Arkansas.

It is not reasonable to suppose that Congress intended to revive and reënact the whole of the act of the 24th of May, 1828, because no part of the first section could be of any avail. No exceptions are made in regard to this act, and no reference is made to it; while in regard to the act of 1824 the parts rejected are carefully excluded, and the residue only is revived and reënacted. The established rules of construction show, that, where a part is named and excluded, the residue is reënacted. *Expressio unius est exclusio alterius.* Co. Lit. 210 a, 183 b; Broom's Legal Maxims, 183, 187.

Every part of the act of 1824, except what relates to the Territory of Arkansas, is revived and reënacted by express words; the court will readily perceive that this case is distinguishable from one reported in 7 Cranch, 382. In that case the language of the reviving act was general in the reference to the acts which had expired. Here it is special and specific, and by several modes of expression negatives any such general inference. There is a plain repugnance between the first and eighth sections of the act of 1824 and the second section of the act of 1828. If, therefore, the law of 1824 is revived and reënacted, it is clear that the law of 1828 remains a dead letter.

Questions bearing a strict analogy have often arisen upon repealing statutes, whether it was the intention of the framers to repeal the whole, or only a part, of the acts to which such repealing statutes were applied. No better mode occurs of illustrating the subject, than by referring to the standard rules of construction which have been adopted by the courts in such cases. The word *repeal* is not to be taken in an absolute sense, if from the whole it appear to be used with a limitation. In every case it is a question of construction whether

it operate as a total, or partial, or temporary repeal. Rex v. Rogers, 10 East, 573.

Where several acts of Parliament upon the same subject had been totally repealed, and others repealed in part, it was held that it must have been the clear intention of the legislature that only the part of an act particularly pointed out should be repealed. Camden v. Anderson, 6 Term R. 723; Dwarris on Statutes, 675.

The general principle undoubtedly is, that the repeal of a repealing statute revives the first act, unless the new law contain words indicative of a contrary intention of the legislature; in which case no such consequence follows.

So, it is said, if an act of Parliament be revived, all acts explanatory of that so revived are revived also; which may be true, unless in the latter case, as in the former, the language of the act authorizes a different interpretation. The Bishop's Case, 12 Coke's Rep. 7; Tattle v. Grimwood, 3 Bing. 496; Dwarris on Statues, 676; Brown v. Barry, 3 Dallas, 367.

And where some parts of a revived statute are omitted in the reviving statute, they are not to be revived by construction, but are to be considered as annulled. Ellis v. Paige, 1 Pick. 43–45; Rutland v. Mendon, 1 Pick. 154; Blackburn v. Walpole, 9 Pick. 97.

The law does not favor implications in construing a repealing or a reviving statute. Loker v. Brookline, 13 Pick. 342, 348; Haynes v. Jenks, 2 Pick. 172, 176; Dwarris on Statutes, 675.

If, then, the act of 1824 alone is revived, it follows, by express enactment, that petitioners are required to set forth the names of adverse claimants. This point is too plain to require argument.

The claimants may contend, that, as they do not claim the lands held by adverse parties, but an equal quantity to be hereafter located on the public domain, no parties except the United States are therefore interested. It will be observed, however, by the eleventh section of the act of 1824, that it is only after it has been decreed that the title to the lands claimed is valid, that the right of entering other lands accrues.

It may also be said, that to make the adverse claimants parties would oust the jurisdiction of the court, because the parties defendants would be citizens of the same State as the petitioners; and that the provisions of the act of 1824, which requires persons to be made defendants, whether they are citizens of a different State or not, are unconstitutional. It is true that an act of Congress cannot confer a jurisdiction not warranted by the Constitution. But the error of the argument on the other side consists in supposing that the act of 1824 was the exercise

of the power vested in Congress, arising out of the character of the parties to the suit, and not out of the character of the cause. The distinction between these two classes of cases, which is obvious upon a mere cursory reading of the second section of the third article of the Constitution, is thus stated by Chief Justice Marshall, in delivering the opinion of the court in the case of Cohens *v.* Virginia, 6 Wheat. 378: —

"Jurisdiction is given in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends 'all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.' This clause extends the jurisdiction of the court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article. In the second class the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more States,' &c. If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union."

The twenty-fifth section of the Judiciary Act is a notable example of the exercise of the power vested in Congress arising out of the character of the cause. The act of 1824 is an exercise of the same authority.

The points made by the counsel for Boisdoré's heirs were the following: —

First Point. The grant emanating from Governor Miro of Louisiana, in 1783, was issued by proper authority, and conferred a valid grant of the lands claimed, though the patent or title in form never issued. From its inception to the time Spain was forcibly expelled this district of country in 1811, and from that time to this, no doubt or suspicion has been entertained of the integrity of the grant, and of its possession in good faith. Its extent only has prejudiced the claim. We insist it was assured as private property under the equity of the treaty of St. Ildefonso, of October, 1800, and expressly by the treaty of Louisiana in 1803. And no indulgent construction of the act of 1824 in its favor is requisite to insure its confirmation by this court. 6 Pet. 723, 728, 729; 8 Pet. 452; 9 Pet. 132, 134, 735, 760; 10 Pet. 341; 12 Pet. 428, 436, 438, 446, 460; 1 How. 24.

Second Point. (This related entirely to the genuineness of the documents offered in evidence.)

Third Point. The partial and incomplete proceedings under the administration of Morales, in 1808 to 1810, instituted to obtain the title in form, we maintain, were lawful and valid to the extent of the adjudications made. That the reference of the subject by Morales to his minister of the treasury, the minister's report favorable to the claim, and then and thereupon Morales's order committing the subject of the application to the Surveyor-General for his action, "that a corresponding title might (may) be furnished," are all proceedings of a judicial character, and furnish evidence of confirmation to this extent. 9 Pet. 743; 8 Pet. 308.

Pintado's despatch, made in reference to these adjudications, but not in pursuance of them, is no doubt invalid, because manifestly unauthorized by the preceding orders. Hence the survey and patent failed.

But this adjudication, to the extent it progressed, was within the lawful jurisdiction of the tribunal, and, pertaining to a date long anterior to the treaty of St. Ildefonso, encounters no opposition from the act of 26th May, 1804, § 14.

Fourth Point. Under the preceding aspect of this case, as well as under the enlarged and liberal equity of the act of 1824, it is of no importance whether any thing was done or suffered, under the government of Spain, for which Spanish authority might have asserted a forfeiture. The commissioners of 1828–29 report the claim as forfeited under the Spanish law, for want of habitation and cultivation. But the report has not a particle of evidence to support this position. It reports habitation only from 1788. (The grant was 1783.) But there is no evidence to show that was the beginning of the settlement. The *requête* shows it was settled before its date, 1783. The Minister of the Treasury reports possession from date of the grant to 1808. And we understand the deposition of Rochon to prove possession from 1784. The report of 1828, then, is obviously untrue in fact, while the whole adjudication by the tribunals in 1808 repels every such conclusion. But we assume, as it is indisputable that Boisdoré occupied and claimed this land before the year 1800, and until the United States acquired the possession, that no cause of forfeiture incurred under the government of Spain, before the year 1800, could be made the subject of inquest and escheat under the government of the United States.

Fifth Point. The act of the 28th of May, 1830, which confirms the report of the commissioners of 1828, and which report recommends this claim for confirmation (for a reasonable quantity) enacts, by way of proviso, that this claim shall not be confirmed to more than twelve hundred and eighty acres.

The record shows that Elihu Carver, United States deputy surveyor, received from the land-office an order of survey, under this act, and, in pursuance of his official duties, and at the cost and expense, and under direction only of the officers of the United States, surveyed the twelve hundred and eighty acres. This law of Congress, and the survey, are interposed in the record as a bar to our claim.

The petitioners disclaim this act; and there is no pretence they ever approved it. No patent has ever issued, the survey is not shown to have been approved, and the record shows sales made of this claim by Boisdoré's heirs to more than five times the quantity so confirmed. The act does not declare a confiscation of the remainder of the claim, and requires no release of one hundred thousand acres of land, for this boon of one thousand two hundred and eighty, being a part thereof. To sustain this bar is to render this proviso in the act of 1830 more potent than the subsequent act of 1844, which gives the right of action under the law of 1824, but which is rendered inoperative as to this case, could this plea in bar prevail.

It is unnecessary to argue what Congress might do in its capriciousness of power. We cannot suppose the court will favor such construction of this act, as imputes the intention to Congress to confiscate this claim, by mere implication of this proviso. Our record proves this claim was regarded good and valid as private property by the Spanish government in 1808. It is unreasonable to suppose the Congress intended to annul or destroy it. 2 Wheat. 203; 7 How. 880; 7 Pet. 86, 87.

Query, If Congress could so confiscate property? 12 Pet. 447. Or could attach a condition and render it obligatory upon such a grant of absolute property, with promise of a title in form? 10 Pet. 306.

Sixth Point. We maintain that the construction of the terms of the grant under the law must define, prescribe, and control the order and direction of the survey; and that the directions, calls, and boundaries prescribed by the decree in this case result from the true and reasonable construction of this grant. 3 Pet. 96, 97; 16 Pet. 199–202.

It is a well-established rule of law, that parol evidence cannot change or vary the written calls in a deed or grant, nor supply calls and boundaries where none are given in the deed.

We have always regarded the boundaries of this claim as the only difficult question in the case. Not that we think it inherently so, but that it has been rendered somewhat questionable from the instructions of the Spanish Surveyor-General Pintado, of the 23d of May, 1810, and by his assumptions in his despatch of the 30th of May, 1810, and his figurative plan therewith.

We will first inquire, What and where is the beginning corner? The grant says, "to commence from the plantation of Philip Saucier." The grant itself shows the plantation of Philip Saucier is at Achoucoupoulous (now Shieldsborough), at the mouth of Bay St. Louis. This is shown by Pintado's instructions of the 23d of May, 1810, and his despatch of the 30th of May, 1810. It is proved also by the witnesses Toulmé, Monet, and Carver. And beside the testimony of these witnesses to the fact, the third volume, p. 9, claim 22, of the American State Papers on Public Lands, shows that this Saucier claim is the same confirmed to Marshall and Joseph Nicaise; and it is shown, too, not to have been surveyed up to the time of confirmation by the United States commissioners. The claim is likewise shown to be a mere order of survey, and not a grant for any specific bounds, except its front on the bay.

The figurative plan furnished by Pintado, with his despatch of the 30th of May, 1810, draws also conjectural or figurative boundaries of the Saucier claim, and starts the line of Boisdoré from what surveyors understand to be a projection of Saucier's north side line, from its northwest corner. We, of course, know that, to have made this effective as a specific starting-point, the lines of the Saucier tract must have been actually laid down. But as we know this was not then done, we have no knowledge from this figurative plan of the call and course which Pintado would have had Boisdoré's north side line run, except we may conjecture he meant it should run in the same course with Saucier's north side line. But nothing shown of that date can fix for us the beginning point of the Boisdoré claim, simply because the Saucier tract was not specifically bounded. But the United States have since surveyed this Saucier claim, and given it established bounds, as Spain might have done. The court below, as our decree shows, construed our first call (to begin from the Saucier tract) to mean from the front (southeast) corner, on the south side of the Saucier claim, and from which our second call takes departure. And if our grant commences from the Saucier grant, it is quite apparent it must be on the side and at the point the decree has assumed.

But Pintado's figurative plan, which appears in this case, commenced the beginning line of the Boisdoré claim on the north side of the Saucier claim; and, though in this respect most favorable to the Boisdoré heirs, is most evidently wrong. And hence surveyor Downing's embarrassment, as per his testimony, on this starting-point. The next call is the Mosquito Bayou, well and clearly established as Bayou Maringouin, or at present Mulatto Bayou. To fix the point of this second

call is the next inquiry. The decree assumes it to be the mouth of that Bayou. This we think obviously right, because the grant of Governor Miro designates the intervening distance between the first and second call the front; and the Minister of the Treasury, Lozada, and the Surveyor-General, Pintado, both so understood it, and surveyor Ludlow, witness for the United States in this case, in answer to cross-interrogatory four, so proves it. And bearing upon this point is the answer of Downing to the fifth cross-interrogatory. But to keep within the undoubted bounds of this second point called for, the decree has assumed the mouth of the Pearl River cut-off, where it enters the Pearl River, as the second point called for, instead of that mouth of the Mosquito Bayou which falls into the Pearl River cut-off; in other words, the second mouth of the Mulatto Bayou, and that which is nearest the point of departure at Saucier's plantation.

Having thus established these two points, and the grant calling for Pearl River as its depth or back boundary, can there be any difficulty in fixing the course which the side lines should run to the Pearl River?

The testimony of five surveyors is found in this record; viz. Carver, Monet, Bringier (Surveyor-General of Louisiana), Ludlow, and Downing, — the two latter both ex-Surveyors-General of Mississippi. All these concur that the side lines should be perpendicular to the base line between the first and second points called for in the grant.

But the answer of the District Attorney of the United States complains that we object to the figurative plan of Pintado shown in the record, and repudiated by the petitioners in their amended petition. The reason for this will be apparent to the court, on inspecting this plan. It conforms in no sort with the calls of the grant. The court, on inspection of the figurative plan, will perceive it gives no side line for the grant, from the Mosquito Bayou to the Pearl River. No construction, which does not violence to the very terms of the grant, can authorize this omission. And the court will see, from Pintado's instructions to Lorreins for the survey of this claim, given only seven days before drawing this figurative plan, that he expressly directed the two side lines from the first two points to be run to the Pearl River. And Surveyor-General Bringier, in answer to the second cross-interrogatory, with Pintado's instructions of the 23d of May, 1810, before him, says, that he understands these instructions as pointing out the same mode of survey as indicated by him, the witness, in his deposition, viz. side lines perpendicular to the base.

But the map or plan given by Pintado, seven days after-

ward, with his despatch of the 30th of May, 1810, to answer in place of a survey, is most clearly wrong, in disregarding the rectangular figure, and giving in fact no side line, in any geodetical sense.

The order of survey in the decree is not only shown to be right by a fair interpretation of the grant, and by the proof in the cause, but it is thoroughly sustained by authority. The usages of Spain, and decisions of the United States, as to the form and figure to be observed in executing such surveys, are identical. In all like cases with this, the rectangular figure is the mandate of the law, where no other is called for. 6 Cranch, 148; 2 Wheat. 316; 3 How. 696, 701, 704.

The case in 6 Cranch, from page 163 to 168, embodies facts not dissimilar to those in this case, and sustains the principles of this decree. And the act of 8th May, 1822, § 4, directs that the form of the Spanish surveys shall guide the officers in the survey of these claims in this district.

Why Pintado, in giving his plan on the 30th of May, 1810, to serve as a survey, chose to discard his own rules given to Lorreins a week previous, we know not, and it is perhaps of little importance to be known. The topography of the country was not then understood, as the maps of the United States surveys now disclose it. It was less known in 1783, when the grant was made. It may have been that Pintado, in 1808, when the territory of Spain in this region had shrunk to this little strip between the Mississippi and Perdido Rivers, imagined himself justified in curtailing the too great generosity of Governor Miro, as exhibited in this grant. We can only suppose some such cause for such obvious disregard to the rights of the claimants under this grant. But our tribunals declare a better morality when they say: "The principles of law cannot in any way be affected by the magnitude of the claims under consideration; every principle of justice forbids it." 6 Pet. 691.

This claim, though large, is of little value, and is useful for little else now than for the object which moved Governor Miro to make the grant; and, large as it is, would make but a limited *vacherie* for the numerous heirs of the grantee, who have come into existence since their rights in this claim have been suspended and deferred.

It was objected by the attorney of the United States, on argument of the demurrer in the court below, that the petitioners had not made all the settlers on this land, who claim title adversely, parties defendant, as originally directed by the first section of the act of 1824. We first answer to this objection, that this provision of the act of 1824 is no longer in

force, being expressly repealed by the act of 24th May, 1828, § 2. And the decision of this court in 8 Howard, 123, is, that the act of 17th June, 1844, only operated to revive the fifth section of the act of 1824.

But this court, in the case of Soulard's Heirs, 10 Pet. 100, where adverse claims were shown in the petition, but the adverse claimants not made parties, held and adjudged the controversy as rightly made between the petitioner and the United States, and this on petition filed in 1824, and of course before the clause referred to was repealed in 1828. But the legislation of Congress by inspection of the laws, rather than the decision of the courts, settles this question.

Mr. Justice CATRON delivered the opinion of the court.

The heirs of Boisdoré filed their petition, in the nature of a bill in equity, pursuant to the act of 1824, revived by that of 1844, against the United States, claiming a decree to a perfect title for a large body of land fronting on the Bay of St. Louis and the Gulf of Mexico, and extending in depth to Pearl River; containing between one hundred thousand and four hundred thousand acres in quantity, depending on the manner in which the claim should be surveyed. A decree was made by the District Court of Mississippi, confirming the claim, and ordering a survey to be made in a particular manner, which will more fully appear hereafter. From this decree the United States appealed; and the first question presented for our consideration is as to the nature and character of the paper title on which the claim is founded.

It was a gratuitous concession, made in 1783, by the Governor of Louisiana, exercising the powers of the king of Spain, and intended mainly for the purpose of pasturage and raising cattle.

A petition was filed by Louis Boisdoré, the ancestor of complainants, representing to the Governor that the petitioner, being an inhabitant of New Orleans, and desirous to form a plantation, or cow-pen, in the vicinity of the Bay of St. Louis, at a place commonly called Achoucoupoulous, for the whole of his petitioner's family; which was very large, as was notorious to his Excellency: and, moreover, that the petitioner might be enabled to employ all his negroes thereon, and to support a large stock of cattle which he had already; which land was, as it were, only inhabitable as, and fit for, a cattle-raising farm: and therefore he proceeds to say: "May it please your Excellency, in consideration of what is above explained, and of the benefit that will result to the capital (city) from such a considerable cattle-raising establishment as the one

which I have commenced to form in the said place and in the vicinity of said city, to grant to me the portion of ground which is vacant in the said place (section of country), known under the name of Achoucoupoulous, running from the plantation of Philip Saucier up to the bayou called Bayou of Mosquito Village, formerly inhabited by Mr. (paper torn off), and running in depth down to Pearl River, in order that I may form with facility the aforesaid establishment and cow-house (cattle-raising farm) for all my family as aforesaid: a favor which I hope, according to justice, from the granting power which is vested in you. New Orleans, 1st April, 1783."

And on this petition the Governor proceeds to grant as follows:—

"New Orleans, 26th April, 1783. Being satisfied with the well-founded reasons expressed above, and with the usefulness and advantage which will result to the capital (city) from the establishment of a cattle-raising farm in that section of country, little fit for any cultivation, the surveyor of the Province, Don Carlos Laveau Trudeau, will establish Louis Boisdoré upon the extent of ground which he solicits in the foregoing memorial, situated in the section of country commonly called Achoucoupoulous, commencing in front from the plantation belonging to Philip Saucier, a resident of said country, down to the bayou called Mosquito Village Bayou, with the depth down to Pearl River; the same being vacant, and no prejudice being caused to the neighbors living as well in front as upon the depth; which measures he will reduce to writing, signing with the aforesaid parties, and will remit the same to me, in order that I may furnish the party interested with a corresponding title in due form.

(Signed,) MIRO."

As the two papers formed the contract between the government and the petitioner, they must be construed together, there being a proposition on one side to do certain acts, and an acceptance on the other, limited by several restrictions. What is stated in either paper as to fact and intent must be taken as true. The facts appearing are, that Boisdoré was an inhabitant of the city of New Orleans; that he had a large family, and that he wished to establish "a cattle-raising farm."

There are several translations of this document from the Spanish, but the true one is, that a stock farm was to be established on the land solicited; and that the establishment contemplated was to be "for all the family" of the petitioner; and on which he was to employ all his force of negroes.

These were leading motives set forth to the Governor; and

the benefit that would result to the city from such an establishment was also presented as a prominent consideration why, on public grounds, the grant should be made.

On these motives, and their obvious consequence if the cattle farm were established as proposed, the Governor acted.

This contract is to be construed with reference to the laws of the place where and when it was made, and the usages and customs observed in making similar concessions.

By the act of 1824, we are required to exercise the power of a court of equity, and to adjudge in the given case whether a court of equity could, according to the rules and laws of Spain, consider the conscience of the king so affected by the acts of his lawful authorities in the province, that he became a trustee for the claimant, and held the land claimed by an equity upon it, amounting to a severance of so much from the public domain, before and at the time the country was ceded to the United States. This was the rule laid down for our government in 1836, in the case of Smith *v.* The United States (10 Peters, 330, 331), and which has been uniformly followed since.

The first act the claimant was bound to perform was taking possession; in regard to which it is proved by several witnesses, by affidavits taken in 1828, and then filed with the register and receiver at Jackson Court-House in Mississippi, and which proofs are made evidence by the act of 1824, that Boisdoré had had possession of a place on the Mulatto Bayou for forty years before 1828; that the land was cultivated, and cattle kept there; and the register and receiver found that the land had been inhabited and cultivated from 1788 to 1828, by Boisdoré and his representatives; nor do we see any occasion to dissent from this finding.

And, furthermore, as it appears from Boisdoré's petition in 1783, that he had commenced forming a cattle-raising establishment at said place, we deem it fair to presume that the possession and occupation proved to have existed in 1788, and afterwards, did also exist from 1783 to 1788; and so the petition to the Circuit Court, seeking a confirmation, states the fact to have been.

As respects the nature and extent of this occupation, the evidence is obscure. Complainants allege "that their ancestor, Louis Boisdoré, during his lifetime, and his representatives after his decease, occupied, possessed, and cultivated said tract of land, from 1783 until the year 1828; that their ancestor, and his widow and representatives, kept up and supported said plantation and grazing farm upon said land during the whole of that period of time, and fully complied with all the condi-

tions of the grant, and all the laws, customs, and usages of Spain in relation to grants of its public domain."

This allegation is directly denied by the answer, and proof of the facts alleged imposed on complainants. Lewis Daniell, a witness examined by them, states, that in 1824, when he first examined these lands, a few acres were cleared near Mulatto Bayou, which had then the appearance of being very anciently cleared and cultivated; that on it and in its vicinity were found weeding-hoes and axes much worn by use; that the old field was the first settlement made on the east side of the bayou, and was made by Louis Boisdoré, according to the general reputation of the country.

Elihu Carver, another witness of complainants, states, that in 1814 or 1815 he learned from cow-hunters, who were old inhabitants, that the old improvement was called Boisdoré's cow-pens; and that there was then another place, within less than a mile, where a person yet cultivated a small field on the east of the said bayou, whom he then understood to be a stock-keeper for Louis Boisdoré; this last place was on the land now owned by F. Saucier.

Samuel White, examined for complainants, states: "I know this bayou, and all the considerable branches thereof; its present name is Mulatto Bayou; it was known by this name as long ago as 1820 or 1821. It took its name, as I always understood, from the mulatto man who lived somewhere near what was formerly called Point Boisdoré, and who was stationed there to take care of the stock of Louis Boisdoré."

By the affidavits taken and filed on behalf of complainants before the register and receiver, in 1828, it appears that th person above referred to was a slave, named Matthew, who belonged after the death of Louis Boisdoré to his widow, and who kept cattle on the land for his widow and heirs. And as this man gave its English name to the bayou, and is proved by White to have kept stock there for Louis Boisdoré in his lifetime, we hold it to be sufficiently established that he had this one slave there, from the date of the grant in 1783; but as the affirmative fact of occupation was imposed on complainants by the pleadings, and as the original improvement on the land was next to nothing, no further presumption can be made that other slaves were there.

The next leading question arises on the necessity of a survey before the land solicited and granted was severed from the public domain; that is to say, whether the grant identifies the land, or whether a survey was required to establish its identity. Boisdoré asked for a grant in the "vicinity" of the Bay of St. Louis, at a place called Achoucoupoulous, running from the

plantation of Philip Saucier up to the Bayou of Mosquito Village (Mulatto Bayou), and extending in depth down to Pearl River.

The Governor ordered Trudeau, the Surveyor-General, to establish Boisdoré on the tract of land he solicited in the section of country called Achoucoupoulous; taking as the front of said tract, from the plantation of Philip Saucier, a resident of said country, down to the bayou called Mosquito Village Bayou, with the depth down to Pearl River, the same being vacant, and no prejudice being caused to the neighbors living as well in front as upon the depth, "which measures," says the decree, "he will reduce to writing, signing with the aforesaid parties (the neighbors), and will remit the same to me, in order that I may furnish the party interested with a corresponding title in due form"; to wit, a title corresponding to the survey returned to the Governor. Boisdoré's tract was to be located by a survey whose front was to commence from Saucier's plantation, and to end at Mulatto Bayou. When this front was established, and a corner at each end of it marked, and a line drawn from corner to corner, then a perpendicular line drawn from each corner to Pearl River was to be the depth. Such was proved by witnesses to be the uniform practice of surveying Spanish concessions, and this we know to be the true rule aside from proof.

The size of Saucier's plantation appears by survey. It is a considerable tract; its southwest corner points towards the bayou, which lies southwest; one line from that corner running south seventy degrees east one hundred and sixteen chains, and the other line running north twenty degrees east fifty-eight chains. According to our construction of the grant, on either of these lines, and at any point on them, the survey might begin with equal propriety. Taken together, they are seven hundred and ninety-six poles long; and this is all the certainty given for a beginning of the first or front line.

The bayou is six or seven miles long, and a notorious stream, being navigable for vessels of light draught, such as navigate the lakes in its neighborhood. It empties into Pearl River by two outlets, which are some three miles apart. From its upper mouth it extends off from the river northeastwardly, when traced upwards.

At some point of the bayou we are called on to establish the second corner of the front line; and as it is equally marked and navigable for six or seven miles of its length, one part thereof as well as another may be selected.

Tracing Pearl River up the stream from either mouth of the bayou, it extends nearly north in its general course, but bear-

ing more or less to the west. Saucier's plantation is about fifteen miles from the nearest part of the bayou.

To strike a base line from the southeast corner of Saucier's plantation to the upper or easternmost mouth of the bayou, then, the second corner would be on Pearl River, some ten miles above its easternmost mouth; and the western perpendicular side line would run up the river, and nearly parallel with its general course, across a large bend to the west, and again strike the river at nine and a half miles higher up, where the bend turns to the east, and is again reached by the western side line.

The eastern side line would strike the river so high up as to include about 400,000 acres in the survey. And such is the mode of survey ordered by the District Court, and which we are called on particularly to examine. But if the western end of the front line were established farther north on the bayou, then the quantity would be increased in proportion as the corner was located farther north, because the corresponding perpendicular side lines would have to be extended in a direction bearing farther east; and would strike the Pearl River still higher up, if they would reach it at all; which is very improbable as respects the eastern side line, if even the middle of the bayou was determined on as the proper point for the second corner. We think it is impossible to contend that the second corner of the front line should be on Pearl River, and that the side line should run up it, and near to it, and each end of the line be on the river, as the Spanish mode was to front on navigable waters, and not mar their fronts by side lines, located near to, but not on, the river.

That the topography of that section of country in which the Spanish surveyor was directed to survey and mark a tract of land for Boisdoré was greatly mistaken by the governor who made the grant, is now too manifest for controversy, as no front line can be laid down, from the ends of which perpendicular side lines will reach Pearl River in depth, without violating the plainest rules of making Spanish surveys. But for all the purposes of a Spanish survey made by a surveyor-general of the Province, such description as the concession sets forth was sufficient, because large latitude was allowed to his discretion. Had that authorized officer certified that the land marked out by him was "at the place granted," then this fact must be taken as *primâ facie* true; the certificate standing on the foot of a deposition. So this court has uniformly held; as in Breward's case (16 Peters, 147), in Low's case (16 Peters, 166), and especially in the United States *v.* Hanson (16 Peters, 199, 200). The Spanish governors gave credence to surveys

made by the surveyor-general, as being at the proper place when it was thus certified in legal form; and the courts of this country have done the same; and this for the reason that the acts of the governor and surveyor-general were both on behalf of the government, each being bound by his duty as a public officer to protect the king's domain.

No nice conformity was required in a Spanish survey, in cases where a section of country was designated by the concession without definite objects being given to govern the surveyor; the objects might be loosely and indefinitely stated by the concession, and yet a survey could be made, subject to the governor's sanction or rejection, because, in the language of this court in Hanson's case (16 Peters, 200), "a grant delivered out for survey meant, not, as with us, a perfect title, but an incipient right; which, when surveyed, required confirmation by the governor." If this land had been actually surveyed by Trudeau, as demanded by the grant, and he had certified that it was at the place granted, and the survey had been returned and filed according to the twelfth regulation of Governor O'Reilly made in 1770; or filed and recorded according to the fifteenth, sixteenth, and seventeenth regulations of the Intendant Morales of 1799, then such survey would identify the land granted.

A fair instance is furnished by this record of the Spanish mode. The time for making a survey having long expired, and a new order of survey being necessary before a complete title could be applied for, the widow of Boisdoré in 1808 applied to the Spanish governor at Pensacola for an order of survey of this claim, on the supposition that he had authority to grant the order. It was made as requested, and Pintado, the surveyor of the Province, was directed to make the survey. He did not examine the ground, but drew a figurative plan for the information of his deputy, to be followed in marking out the grant.

This plan begins at the southwestern corner of Saucier's plantation, and pursues a line due west to Pearl River, runs down the river to its mouth, and then with the ocean to Saucier's land, and with it north seventy degrees west to the beginning. Although no call of the grant but the beginning was regarded in this plan, yet, if the survey had been actually made, certified, and returned in conformity to said plan, then the tract would have been identified according to usage, had the Spanish jurisdiction continued over the country where the land lies. But no actual survey having been made at any time, it was imposed on the court below, and it is now imposed on this court, if in its power, to identify and cause to be

surveyed the land granted. If, however, its identity cannot be fixed, and it cannot be ascertained that any specific tract was severed from the public domain by the grant, at the time Spain ceded Louisiana, then the claim cannot be ripened into a complete title by our decree; as we only have power to adjudge what particular tract of land was granted. Our action is judicial. We have no authority to exercise political jurisdiction and to grant, as the governors of Spain had, and as Congress has. If we were to locate by survey the land claimed at random, in some part of the district of country known as Achoucoupoulous, exercising our discretion as respects the proper place, and to decree on our own survey, and thus divest the United States of title, then we should do what Congress has often done when surveys were ordered of claims founded on settlement, and what a Spanish governor usually did on the return of a survey; we should exercise the granting power; should deal with public lands, — public to the time of our decree, and first made private property by it: ours would be an exercise of political jurisdiction, and not a judicial decree.

In its endeavor to locate this grant, the District Court examined witnesses of experience and capacity as to the possibility of doing so, and came to the conclusion that it could be done; and, as partly stated already, a survey was ordered, to begin at the southern part of Saucier's plantation on the ocean, at the mouth of the Bay of St. Louis, and to meander the ocean to the eastern mouth of Pearl River, and then up the same to the upper mouth of Mulatto Bayou. From this point to the place of beginning a theoretic base line was to be drawn; and from each corner thus established, perpendicular side lines were to be extended to Pearl River for the depth. The witnesses agree that, if the first two corners are established, then the survey can be made, if the side lines would reach Pearl River. They had before them, as we have, the plan of the United States surveys, and the localities established by them, and merely expressed opinions as to the proper mode of survey. They do not agree as to where the first corner or the second corner of the base line should be; and as this is a question of legal construction of the grant, on comparing it with the face of the country, a judicial tribunal is the proper forum, and best qualified to decide the question. Conclusive information was not to be expected from practical surveyors, however experienced; yet their opinions are entitled to much consideration.

Alexander Downing, late Surveyor-General of Mississippi, declares it to be his opinion. that "the phrase in the grant to

Louis Boisdoré, 'the front thereof to commence from the plantation of Philip Saucier, and running to the Bayou of the Mosquito Village,' is not sufficiently definite to enable a surveyor to fix upon a beginning point or corner; both the beginning point and the front line seem to be left to the discretion of the surveyor, and it is questionable whether any two surveyors would settle upon the same point for a beginning."

We agree with this witness as respects the beginning point. But we find still more uncertainty in determining where the second corner should be established, as there a range of discretion exists between the head and mouth of the bayou, to an extent of six or seven miles. Our opinion is, that the front line cannot be laid down by a judicial decree, because of the vague description in the grant; and consequently, that no parallel side lines can be established.

How, then, do the rights of complainants stand on the facts, the Spanish laws being adopted as the governing rule? In the first place, their ancestor held the concession in his own possession for twenty years under the Spanish government; that is to say, from 1783 to 1803, without calling for a survey. His claim remained precisely as it was at its date, up to the time we acquired Louisiana. It was presented in 1808 to the Spanish governor at Pensacola, and a survey and complete title solicited; but as no actual survey was made, and as no jurisdiction then existed in the Spanish authorities over that section of country, this step passes for nothing. Some notice of this claim was taken by Commissioner Crawford, whose report condemned it. In 1820 it was filed and recorded in the land-office at Jackson Court-House, and a confirmation sought from Congress on a recommendation of the register and receiver acting as land commissioners. This was in fact the first legal step taken by complainants or their ancestor, after the concession was made. For thirty-seven years they slept on their rights; and in the mean time large masses of the land now claimed by them were granted to others, under both the Spanish and American governments; and this neglect for twenty years of the time was in plain violation of the Spanish laws, and the face of their concession; each requiring a legal survey and specific designation of the land granted.

In the second place, no possession was ever taken according to the terms of the grant. A large tract was solicited by Boisdoré where he could establish his "whole family, and employ all his negroes" in carrying on the establishment. His family was very large, according to his own showing; it consisted of a wife, children, and slaves. A removal to the premises from the city of New Orleans of this whole family was

proposed by Boisdoré, and was contemplated by the Governor; and as a further inducement he was assured that much benefit would result to the capital from such a considerable cattle-raising establishment in its vicinity. It was to be so large as to be of public consideration. These were the notorious promises on which the Governor acted. And what was the compliance on the part of the grantee? He represented that he had then commenced forming his establishment at the place. It appears to our satisfaction, by proof, that five years afterwards he had a single slave there, who kept some cattle, and that a slight patch of a few acres was cleared; and we take it to have been cultivated. The slave continued at the place cleared, or near to it, for many years; say up to 1814 or 1815.

If the establishment had been commenced in 1783, when the grant was made, (and we are bound to hold that it had, as the petition to the Governor alleges the fact,) then it is hardly possible that it could have been on a smaller scale than it ever after continued; there being but a single slave there at any time. It could only have been less, by having no one at all on the premises. It is therefore manifest, that no additional possession was taken by Boisdoré or his representatives, in compliance with the terms of his contract, after its date. He obviously abandoned the idea of taking his whole family to the place, and of employing all his slaves there; and consequently abandoned all intention of having the land surveyed and himself and family established on it by the Surveyor-General. And to hold that such a trifling occupation, in utter neglect of Boisdoré's promises to the Spanish authorities, and the duties imposed by the grant, fastened an equity on the conscience of the king of Spain, and his representative, the Governor of Louisiana, to complete the title, would in our opinion be altogether inadmissible.

Various circumstances must be taken into consideration in this connection. It was the duty of the grantee to do two controlling and requisite acts before he could ask for a completion of his title;—first, to present his concession in due time to the Surveyor-General of the Province; and secondly, to take possession in substantial compliance with the terms of his grant.

Had the survey been returned with the proces verbal, or certificate attached, stating the fact of possession having been given according to the grant, and that the survey did no injury to others; then the effectual and conclusive title could have been issued, divesting the rights of the Spanish government; and then only.

Can it be believed that the Governor of Louisiana intended conclusively to grant a domain of fifteen miles wide and over forty miles long (as large as an ordinary county), for the mere purpose of *a cow-pen?* and that he would have sanctioned a survey and completed the title, if the surveyor of the Province had reported to him, as was his duty, that Boisdoré declined to remove his family, white or black, to the place, or to employ his slaves there, with the exception of a single cowherd; and that the improvement of the place was as slight as it could well be, — that it amounted only to a trifling patch of a few acres? Such a proposition shocks all sense of equity, and is contrary to the settled policy of the Spanish government; which was, to make gratuitous grants for the purposes of settlement and inhabitation, and not to the end of mere speculation.

And, again, the grantee might have his land surveyed, or he might decline; he might establish himself on the land, or decline: these acts rested wholly in his discretion. But if he failed to take possession and establish himself, he had no claim to a title; his concession or first decree in such case had no operation. So the Supreme Court of Louisiana held in Lafayette *v.* Blanc, (3 Louisiana Annual Reports, 60,) and in our judgment properly. There, the grantee never having had actual possession under his concession, the court decided that he could set up no claim to the land at law or in equity. This case followed Hooter *v.* Tippet (17 La. Rep. 109). We take it to be undoubtedly true, that, if no actual possession was taken under a gratuitous concession given for the purpose of cultivation or of raising cattle, during the existence of the Spanish government, no equity was imposed on our government to give any consideration or effect to such concession, or *requête.*

And, in the next place, it was held in Lafayette *v.* Blanc, that if the party took possession, but had no survey executed during the time Spain exercised jurisdiction, this being his own neglect, it lies on him to establish the boundaries of his grant, and to identify his land with such certainty, as to show what particular tract was severed from the public domain; and if he fails to do it, then he has no remedy in a court of justice. And this part of the decision we also approve.

Here there was no survey, and we are of opinion, first, that complainants have not identified any particular tract of land that was granted; and secondly, that, if they had, no possession was taken, or pretended to be taken, such as the agreement between the Spanish authorities and the grantee contemplated. And therefore it is ordered, that the decree of the District Court be reversed, and the petition dismissed.

Mr. Justice McLEAN, Mr. Justice WAYNE, and Mr. Justice McKINLEY dissented.

Mr. Justice McLEAN.

In the opinion of a majority of the court, the grant in this case is rejected, for a want of certainty in its calls. As I cannot agree with this view, I will state, in few words, the grounds of my dissent.

The petition to the Governor-General for the grant represents that Louis Boisdoré, "being desirous to form a plantation or cow-pen in the vicinity of the Bay of St. Louis, at the place commonly called Achoucoupoulous," &c., that he may be enabled to employ all his negroes thereon, and to support a large stock of cattle, prays, "in consideration of what is above expressed and stated, and of the benefit which will result to the capital from a large cow-pen, such as that he had commenced to establish at and near said place, to grant him the parcel of land which may be vacant at the above-mentioned place known by the name of Achoucoupoulous, to commence at the plantation of Philip Saucier, and to run therefrom to the Bayou of Mosquito Village, formerly inhabited by Mr. Loisser, and extending in depth to Pearl River, that he may be enabled to form with facility the above-mentioned plantation and cow-pen for the whole of his family," &c., and is dated 1st April, 1783.

On the 26th of April, 1783, Governor Miro, resident at New Orleans, answers the application by saying: "It appearing to me that the grounds and reasons stated by the petitioner are well founded, in relation to the utility and advantages which will result to the capital from the establishment of a cow-pen in those places which are badly adapted to cultivation, the surveyor of the Province, Don Carlos Laveau Trudeau, shall establish Louis Boisdoré on the tract of land which he solicits in the antecedent memorial, situated at the place commonly called Achoucoupoulous, the front thereof to commence from the plantation of Philip Saucier, an inhabitant of said place, and running to the Bayou of Mosquito Village, and extending in depth to Pearl River, should the same be vacant, and cause injury to no one of the surrounding settlers, either in the front or the depth thereof; whose proceedings shall be made out and signed by him with the before-mentioned persons, and sent to me to furnish the party interested with a title in form."

This tract of land seems never to have been actually surveyed. On the 4th of April, 1808, Gilberto Guillemard applied to the Intendant-General at Pensacola for an order of

survey, representing that Trudeau, the surveyor, by reason of the expense and his pressing duties, had not executed the survey, and a request is made that Pintado, the present surveyor, may mark out the boundaries, &c. The application was granted, but Pintado, instead of making an actual survey, marked out a figurative plan by which the distances could be ascertained. He says: "Two years having elapsed without being able, from the emergency of my business, to attend personally to make out the boundaries, and to make the survey required; and not having at the said place a deputy to execute the same; and that the heirs claiming the same may have an authentic document issued in their favor from which may be made appear the right of property and ownership which to the said lands they have and hold in virtue of the said grants; and also the shape and figure which the said tract of land ought to have," &c.

The boundaries, as above designated by Pintado, are shown by a plat in the case. It is true, that the above proceeding in relation to the survey took place after the surrender of Louisiana to the United States, which terminated all foreign power over the territory, but the proceeding shows that there was no forfeiture under the Spanish government, for the want of a survey, or on any other ground; and it also shows that the places called for in the grant were deemed sufficiently certain by Pintado, the Surveyor-General, to make the survey.

What was the nature of the title given by Miro, the Governor-General, to Boisdoré? He petitioned the Governor for a "grant" of the land at the place named, for the purposes stated. The Governor, admitting that "the grounds and reasons stated by the petitioner were well founded, and that his proposal was advantageous to the capital," directed the surveyor of the Province, Don Carlos Laveau Trudeau, to establish the petitioner on the land he solicits, designating the boundaries, &c. If there be sufficient certainty in the boundaries called for, there can be no doubt that the grant of the Governor separates the land from the public domain, and that, in every view, constitutes property under the treaty with France. There were no conditions expressed upon the face of this grant. The consideration is named, but not as a condition.

The petition which is referred to in the grant constitutes a part of it. The vicinity of the Bay of St. Louis, the place known by the name of Achoucoupoulous, the plantation of Saucier as the beginning point called for, "and to run therefrom to the Bayou of Mosquito Village, and extending in depth to Pearl River";—all these calls are identified, and shown by parol evidence and the maps which are in the case.

And the great question is, whether, from the calls of the grant, the survey can be executed. These calls are clear and specific. They are the plantation of Philip Saucier, on the Bay of St. Louis, the rivulet or Bayou of the Village of Mosquitos, in the district called Achoucoupoulous, and extending in depth to Pearl River. All these calls are proved to exist, and they are more special than nine tenths of the calls in the Spanish grants which have been confirmed.

Pintado, by his figurative plan embracing those calls, seems to have had no difficulty in directing how the survey should be made. And he was the Surveyor-General of the Province under the Spanish government, and may be presumed to have been well acquainted with the Spanish laws and usages on the subject of surveys. Morales, who sanctioned the grant in 1808 by ordering the survey, was Intendant-General, and had the same powers to grant land as the Governor-General previously had, and he was distinguished for his general intelligence and high capacity to represent his sovereign in the important duties which were committed to him. The grant was also sanctioned by Juan Lozado, the fiscal minister *pro tem.*, to whom the petition of Guillemard in behalf of Boisdoré's representatives was referred, and who recommended that the survey be made.

L. Bringier, a witness, states, "that he has been a surveyor for upwards of thirty years, and for more than twenty-five years Surveyor-General of the State of Louisiana, during which period he has had the records of Spanish surveys in his charge, and had frequent occasion to refer to them, and survey lands in conformity to them; that he understands the Spanish language; and he says that he agrees with Pintado as to the mode of running the lines of the survey. He thinks the description of the grant is sufficient to enable a surveyor to make an accurate survey of it," &c.

Elihu Carver, who says that he is a practical surveyor, on being asked how he would survey a Spanish concession which calls for two points as the front upon the sea-shore or a water-course, and calls to run in depth to another water-course for quantity, answers "that he would run from one of the first points back to the watercourse a distance equal to the front given, thence direct to the last point in the front." He says that he has surveyed many Spanish claims, and, except one, he never found the boundaries all round. That he does not pretend to be sufficiently acquainted with the Spanish customs and usages to pronounce upon the claim in question.

B. A. Ludlow states, that he is a practical surveyor, and has held the office of Surveyor-General for the district south of Tennessee. He has examined the survey of Boisdoré, and be-

lieves the survey to be practicable, provided the plantation of Philip Saucier and the Bayou of Mosquito Village can be identified. "The survey should be made," he says, "by finding a straight line between the above-mentioned points, and raising perpendiculars upon said line, at its extremities, extending back to Pearl River," &c. "Exceptions to this rule," he says, "sometimes occur by watercourses or the lines of other claims causing a deviation," &c. He says he is familiar with the seashore which constitutes the front of the Boisdoré claim. From his general knowledge of the country, he can see no material difficulty in making the survey of the claim, &c.

A. Downing has been many years a practical surveyor, and has held the office of Surveyor-General of the public lands for the State of Mississippi. He says, "the phrase in the grant to Boisdoré, 'the front thereof to commence from the plantation of Philip Saucier,' and 'running to the Bayou of Mosquito Village,' is not sufficiently definite to enable a surveyor to fix upon a beginning point or corner; both the beginning point and the front line seem to be left to the discretion of the surveyor, and it is questionable whether any two surveyors would settle upon the same point for a beginning. I certainly could not adopt the view of Pintado, the Spanish Surveyor-General, for in the diagram filed in the case, and to which he refers in his instructions, he places what should be the most easterly front corner on the back line of the Saucier plantation." And he says the side line "from the mouth of the Bayou of the Mosquito Village, at right angles from a base line between the front corners, would, apparently for several miles, range close along and parallel with the east margin of Pearl River, and consequently conflict with the uniform practice of the location and survey of grants upon all navigable streams and shores."

This is the substance of the evidence in the case in relation to the calls in the grant. And it must be remarked, that all the witnesses, with the exception of Downing, think that the calls of the grant are sufficient to enable a surveyor to mark out the boundaries. Downing supposes that no two surveyors would agree on the beginning corner, or as to the second point and lines called for. But in this he is mistaken. In the first place, the Spanish authorities who held the calls of the grant sufficient are Miro, the Governor-General who issued it, and Morales, the Intendant-General, Trudeau and Pintado, surveyors-general, and Lozado, the fiscal minister. These, when connected with the statements of the above witnesses, would seem to leave little doubt as to the sufficiency of the calls of the grant.

Upon this question we must not forget that we are acting upon a Spanish grant, and are governed by Spanish laws, usages, and customs. And if such a grant were valid under the Spanish government, and there has been no forfeiture of the right, we are bound by the plighted faith of our own government to sustain the grant. And in administering this foreign law, we must ascertain and regard the usages under it, in the acquisition of titles to land. This is a universal principle, respected by all courts, in the administration of justice. Parol evidence must be heard to establish those usages, in addition to what may appear from the action of the local tribunals. In the States of Virginia, Kentucky, Tennessee, North Carolina, Pennsylvania, and in a large district of country in Ohio, the usages in making entries and surveys of lands constitute the laws of the respective States, the usage of each State differing more or less from that of the others. One instance only will be named as peculiar, perhaps, to Kentucky and Ohio. The holder of a warrant for one thousand acres locates it, and in his survey includes fifteen hundred acres of land, more or less, and yet his survey is held valid. This, to one wholly unacquainted with such a rule of decision, would be thought unreasonable, and might be disregarded; and yet it is a rule of property which no court can reject.

To establish entries under this system parol evidence is always heard, as to the calls made, and the objects called for, &c. And although the survey may deviate from the calls of the entry, it is held valid, if it interfere with no prior rights. This rule of decision, so firmly established in our own country, should be applied with an enlarged liberality when acting on land titles acquired under a foreign government, of whose language and usages we have comparatively but little knowledge. The act of Congress of the 26th of May, 1824, revived and applied to these titles by the act of the 17th of June, 1844, under which we exercise jurisdiction, provides that a claimant under "any French or Spanish grant, concession, warrant, or order of survey, legally made, granted, or issued before the 10th of March, 1804, by the proper authorities, to any person resident in the Province of Louisiana," &c., "which might have been perfected into a complete title, under and in conformity to the laws, usages, and customs of the government under which the same originated, had not the sovereignty of the country been transferred to the United States, may file his petition," &c. And the proceeding is required "to be conducted according to the rules of a court of equity," &c.; and the court is authorized "by a final decree to settle and determine the question of the validity of the title, according to the law of nations, the stipu-

lations of any treaty, and proceedings under the same, the several acts of Congress in relation thereto, and the laws and ordinances of the government from which it is alleged to have been derived," &c.

I will refer to some cases where grants similar to the one under consideration have been held valid by this court. In the United States *v.* Percheman, 7 Peters 54, the petitioner asked "two thousand acres of land in the place called Ocklikwaha, situated on the margin of St. John's River." Governor Estrada says, "I do grant him the two thousand acres of land which he solicits, in absolute property, in the indicated place." The survey of this land was not executed until the 20th of August, 1819, after the treaty of cession. The title was confirmed by this court.

In the case of the United States *v.* Clarke, 8 Peters, 446, the petitioner solicited a grant of the quantity of land which the Governor of Florida had thought proper to assign to the water-mills, equivalent to five miles square; which lands he solicits "on the western part of St. John's River, above Black Creek, at a place entirely vacant, known by the name of White Spring." In the grant it is declared, "A title shall be issued comprehending the place and under the boundaries set forth in the petition." This was also confirmed.

In the case of the United States *v.* Levi, 8 Peters, 479, the grant was "for twenty-five thousand acres of land, south of the place known by the name of Spring Garden, in this form: twelve thousand acres of them, adjoining the lake or pond called Second, and known by the name of Valdes, and the remaining thirteen thousand acres on the pond farther above the preceding, known by the name of Long Pond, the whole west of the River St. John." The survey was executed on the 2d of August, 1819. This court confirmed the title. Another grant in the same case was for "seven thousand four hundred acres, lying on a stream running from the west, and entering the River St. John, and called in English the Big Spring, about twenty-five miles south of St. George's Lake, one of the fronts of the said tract to be on St. John's River, and to be divided in two parts by the stream aforesaid." This survey was made on the 5th of April, 1821. The title was confirmed.

In the same case another grant, which was confirmed by this court, was for eight thousand acres, being part of a larger parcel containing ten thousand acres, &c., "five thousand of them in a hammock to be found five or six miles east of Spring Garden, and the remaining five thousand west of the River St. John, contiguous to a creek called Black Creek, near Fleming's Island and the pond called Doctor's Lake."

Another grant in the same case was confirmed for "twenty thousand acres," described as lying "in the hammocks known under the names of Cuscowillo and Chachala, situate west of the place of the River St. John's where there was a store of the house of Panton, Leslie, & Co., and about thirty miles from it."

Similar citations might be made from any of our reports of the last fifteen or twenty years, but the above are sufficient to show the course of the Spanish authorities in granting lands, and the decision of this court upon such grants. Many of the surveys, it will be observed, were made under Spanish authority, after Florida was ceded to the United States.

The reader, if any one shall read the above citations and the grant of Boisdoré, will be struck with the much greater certainty in the calls of his grant, than in the calls of any one of the grants above stated. And yet they were confirmed, and his is rejected for want of certainty. By virtue of what law this greater certainty is now required in the calls of a grant I am not able to determine. In my own mind I am assured it cannot be under the Spanish law. And I am greatly mistaken if our decision on Spanish titles must not rest on Spanish law.

The tract claimed is said in the argument to be large. Of what importance is that to a court which deals with established principles? In this respect we can exercise no discretion. If the claim of Boisdoré was property under the Spanish government, it is protected by the treaty. That it was so considered under the usages and acts of the Spanish government, to my mind, is clear. I therefore dissent from the judgment of the court.

Mr. Justice WAYNE.

I dissent from the opinion of the majority of the court in the case, concurring with all the views expressed by my brother McLean, and dissenting from every position of fact or argument in the opinion of the court. In my opinion, the opinion of the court is a departure from all heretofore adjudged by the court in respect to the right of property secured by our treaties with France and Spain to the inhabitants of Louisiana and Florida.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Mississippi, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the grant of petitioners had no identity, and cannot be surveyed

so as to give it boundaries. And secondly, if it could be identified, that no occupation and inhabitation were ever taken according to the terms of the grant, and therefore the claim is without equity according to the laws of Spain.

Whereupon it is now here ordered, adjudged, and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said District Court, with directions to dismiss the petition of the claimants in this cause.

EVARISTE BLANC, PLAINTIFF IN ERROR, v. GEORGE W. LAFAYETTE AND JOHN HAGAN.

In 1816 the register and receiver of a land dce, acting under the authority of a law, reported as follows: "W3 are of opn n that all the claims included under the second species of the first class are already confirmed by the act of Congress of the 12th of April, 1814."

In 1820 Congress passed an act (3 Stat. at Large, 573) confirming all those claims which were recommended in the report for confirmation.

But where the commissioners erred in placing a claim in the second species of the first class, and erred in supposing that such a claim was already confirmed by the act of 1814, these errors prevent the act of 1820 from confirming the claim. It is consequently invalid.

THIS case was brought up from the Supreme Court of Louisiana, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

By agreement of counsel in the State court, many original documents were used in the trial in the Supreme Court of Louisiana, which were left out of the record when it was transmitted to this court. It did not, therefore, furnish all the facts necessary for a complete statement of the case, which, however, have been taken from other authentic sources.

It was a conflict between a patent issued for some land near New Orleans to General Lafayette, in 1825, and a clam advanced by Blanc under an old Spanish alleged grant. If the latter was not good, the patent to Lafayette covered the land in dispute. Blanc claimed under Liotaud.

On the 23d of May, 1801, Louis Liotaud presented a petition to the Intendant Morales, praying that a tract of public land be granted to him, having six arpents front on the left bank of Canal Carondelet, with the ordinary depth, if there should be such a depth vacant, being bounded on the one side by the land of Carlos Guardiola, and on all the other sides by

public land. He states as a reason which entitled him to the favorable notice of the Intendant, that his object was to establish a large garden and drain the land, which would be advantageous to the public, and contribute to the salubrity of the city. And he bound himself to conform to the regulations relating to grants of land.

On this petition an order was made on February 11, 1802, which is attested by Carlos Ximenes, the notary, in these words: "Vistos: pasese este expediente al agrimensor gnl. Don Carlos Trudeau para que en vista de el informe lo conbeniente." "Let this petition be referred to the Surveyor-General, Don Carlos Trudeau, in order that he may report his opinion thereon."

These appeared to be all the papers to support the claim. No survey was ever made, nor any report upon the petition.

On the 12th of April, 1814, Congress passed an act (1 Land Laws, 242) confirming certain claims in Louisiana. The title of the act is, "An Act for the final adjustment of land titles in the State of Louisiana and Territory of Missouri." By it certain claims were confirmed which had been presented to the register or recorder of land titles in the mode pointed out by a preceding law. Liotaud had filed a claim in the land-office, stating in his application, "This land is claimed by virtue of proceedings had before the Spanish intendancy in 1801 and 1802, of which proceedings the accompanying document is a true copy, as taken from the original in the register's office for the eastern district of Louisiana."

On the 20th of November, 1816, the commissioners made their report, and noticed this claim as follows: —

"Louis Liotaud claims a tract of land situated in the county of Orleans, on the left bank of the Canal Carondelet, leading to the Bayou St. John, containing six arpents in front and forty in depth, and bounded on one side by lands granted by the Spanish government to Carlos Guardiola, and on the other side by vacant lands. This tract of land is claimed by virtue of an order of survey dated in the year 1802."

The commissioners included this claim in the second species of the first class of claims, on which the board reported as follows: "We are of opinion that all the claims included under the second species of the first class are already confirmed by the act of Congress of the 12th of April, 1814.

On the 16th of January, 1817, the Commissioner of the General Land-Office transmitted this report to Congress, and on the 11th of May, 1820, Congress passed an act (3 Stat. at Large, 573), entitled "An Act supplementary to the several acts for the adjustment of land claims in the State of Louisiana."

The first section of this act was as follows: "That the claims for lands within the eastern district of the State of Louisiana, described by the register and receiver of the said district in their report to the Commissioner of the General Land-Office bearing date on the 20th of November, 1816, and recommended in the said report for confirmation, be, and the same are hereby, confirmed against any claim on the part of the United States."

So the matter stood until the year 1825, when, as has been already mentioned, a patent was issued to General Lafayette, which included the land claimed by Liotaud.

On the 1st of May, 1841, George Washington Lafayette, residing in France, and John Hagan, residing at New Orleans, brought a petitory action against Evariste Blanc, who claimed under Liotaud. The defendant alleged that he then was, and had been for more than a year before the commencement of the suit, in quiet possession of the land, and denied the plaintiffs' possession or right of possession. He also pleaded the prescription of twenty and thirty years.

In May, 1846, the cause came on for trial in the Parish Court in and for the parish and city of New Orleans, when there was a judgment for the defendant. The plaintiffs appealed to the Supreme Court of Louisiana, by which, in January, 1848, the judgment of the Parish Court was reversed; and to review this decision, upon the ground that his claim was confirmed by an act of Congress, Blanc sued out a writ of error, and brought the case up to this court.

It was argued by *Mr. Bullard*, for the plaintiff in error, and by *Mr. Janin*, in a printed argument, for the defendants in error.

Mr. Bullard stated the case, and then proceeded.

The only question, therefore, which this court is called upon to solve is, whether the claim of Louis Liotaud was confirmed by the act of the 11th of May, 1820, and to that act and the report of the register and receiver to which it relates, I proceed to invite the attention of the court.

The report of Harper and Lorrain was made in November, 1816, and was laid before Congress by the Secretary of the Treasury. It is to be found *in extenso* in the State Papers (Public Lands), Vol. III. pp. 254 *et seq.*

The claim of Liotaud, numbered 409, is classed by the register and receiver in the second species of the first class.

The act of the 11th of May, 1820, provides, that "all claims described in this report and recommended for confirmation are confirmed." See Laws, Instructions, and Opinions, 1st part, p. 330, Act of 11th May, 1820.

In determining what particular claims were confirmed by this act, the court ought, I think, to look at the whole report together, and if it appears that the register and receiver regarded them as valid claims under the various acts of Congress, in whatever form of words that opinion was expressed, a liberal construction should be given to the act. It is true the register and receiver say in relation to the claims classed with this, that in their opinion they are already confirmed by a previous act of Congress in 1814. In this they were perhaps mistaken; but surely it is a strong form of expression of an opinion that they ought to be confirmed. The court below gave a very narrow and illiberal construction to the act, and, seizing upon this expression, declared that it was a mistake, and that the act did not confirm this claim. If they had looked further into the report they would have found that the commissioners make favorable mention of this claim, although they say they may have been mistaken in supposing that it had already been confirmed. The truth is, as it appears to me, all the claims thus classed, all that were not rejected by the register and receiver, were, according to a just and liberal construction of the act, treated as valid claims under the treaty, and confirmed by the act of 1820. They have always been so treated and regarded by the Land Department of the government, and this very claim is laid down on the public surveys of the township in which it is situated.

If, then, in 1820, the government relinquished its title to the land in controversy in favor of a claimant under an inchoate Spanish grant, it seems quite clear that the same land could not validly be patented to General Lafayette in 1825, as a donation, or in remuneration for eminent public services. It no longer belonged to the domain. It is true no patent ever issued to the confirmee, but the act of 1820 does not provide for patents in such cases, and I presume this court will hold that the act itself is a legislative grant of land with specific boundaries, and that the act of Congress, together with a location and survey approved by the Surveyor-General, is equivalent to a patent. Such is the view taken of it by the Department of the Interior. I admit the general rule to be, that the legal title is still in the domain until a patent issues, but that rule only applies to cases in which, by law, a patent is required for the perfection of the title of the confirmee or purchaser, or other grantee.

The court of Louisiana further erred in looking behind the confirmation, and deciding that the primitive inchoate title was not valid according to the laws and usages of the government of Spain. They cite some old cases from the Louisiana Re-

ports to that effect, but those were cases in which neither party had a legal title; both held under commissioners' certificates, and had only equitable titles, and the court decided upon the comparative value of the primitive titles. When the register and receiver have recommended an ancient Spanish title for confirmation, and it has accordingly been confirmed by an act of Congress, I conceive that it is conclusive and cannot be opened. But even if the court had a right to look behind the confirmation, it was in error in supposing that the imperfect title of Liotaud was not valid under the Spanish law. In 1798, the Governor-General was deprived by a royal *cedula* of the right of granting lands, and that authority was vested in the intendancy. The forms of proceeding in the tribunal of the intendant, with a view of obtaining a grant of land, are familiar to this court. The person who desired to obtain a concession of land presented his petition (*requête*) to the intendant. The intendant, through the medium of a notary, made a written order referring it to the surveyor-general, in order to ascertain whether the land was vacant. In the particular case now before the court this was done. It does not appear that the surveyor-general made any particular report, but it does appear that he noted on a general plot of land near New Orleans, made by order of the government, the tract of land solicited by Liotaud. Here all further proceedings were arrested by the change of government in 1803. The papers were filed in the office of the intendant, and marked with others "*instancias pendientes*," or proceedings yet pending. The order, or *auto*, of the intendant must be regarded as a *primero decreto*, and equivalent to a warrant or order of survey under the preceding forms of proceeding while the governor had the power to grant lands; although the land thus solicited did not become the property, strictly speaking, of the petitioner, yet under numerous decisions of this court I submit whether it did not confer such a right as was protected by the treaty of cession. Be that, however, as it may, the question now is, whether the claim founded on such a commencement of title has been recommended by the commissioners for confirmation, and confirmed by act of Congress; if so, it clearly amounts to a relinquishment of title on the part of the United States from the date of the act of Congress, and in 1825, the date of Lafayette's patent, must be regarded as a rightful claim, and not embraced in the grant to Lafayette by his patent.

Mr. Janin, for the defendants in error, made the following points: —

1st. There never was a grant or order of survey, or even a permission of settlement, in favor of Liotaud. There was a petition and an order to Trudeau to give his opinion on it, and that is all. The petition was of the 23d of May, 1801, the order was not made on it until the 11th of February, 1802. And we have a plan introduced by the defendant, dated the 1st of March, 1802, purporting to be a plan of the concessions in the neighborhood of New Orleans, executed by Trudeau by order of Morales. On this the land claimed by the defendant is designated as "*Terreno solicitado per Don Louis Lioto* (*Liotaud*)." Trudeau, therefore, knew of this claim, and if he did not report on it, it was not unintentionally. Possibly he knew that it conflicted with the claims of Castillon and Griffon (see Turner's survey of 1825), possibly he thought that the land ought to be reserved for the commons of the city; but whatever might be his reason, certain it is that he did not report on it, still less survey it. Adjoining this is another tract, marked on that plan "*Terreno solicitado per Don Gilberto Guillemard.*" That tract was no doubt claimed and petitioned for in the same manner and form as Liotaud's. And yet it is included in the undisputed portion of General Lafayette's grant. Very probably the petition was, and perhaps still is, in the same bundle of "*instancias pendientes*" in which Liotaud's petition was found. And as Liotaud's petition was No. 107, fol. 61 (see Lawson's certificate) of the "*instancias pendientes*," we have the assurance that there are at least 106 other such claims which have the same merit as Liotaud's. But he was the only one to claim a confirmation on an abandoned, neglected, or rejected petition. And he did not (see his notice) pretend that he had an order of survey. His claim was based on "proceedings." It is thus he qualified his petition and the order of reference. But no Spanish law or act of Congress is extant recognizing a claim to land merely because it was asked for.

2d. This claim has never been confirmed. This case is identical with that of Orillon *v.* Slack, 11 La. Rep. 591. Reboul and Franchebois's claims, discussed in that case, are embraced in the same report as Liotaud's, and separated from it by only three claims. 3 Public Lands, 255, 256. The court held that the report of the register and receiver of November 20, 1816, that these claims were already confirmed by the act of April 12, 1814, was not a recommendation that they should be confirmed, and as the act of May 11, 1820, confirmed only such claims as were embraced in the report and recommended for confirmation, it did not confirm the claims in question. The register and receiver did not recommend

them for confirmation, because in their opinion they were already confirmed. Whether they were right or wrong in this opinion, they certainly did not recommend them. They left them where they were. On such claims as were confirmed by the act of April 12, 1814, they were not to make a report recommending them for a second confirmation, nor did they do so; but they were authorized, by the third section of that act, to issue at once certificates of confirmation, which the Commissioner of the General Land-Office was to examine, and which were to be followed by patents. The opinion expressed in the report of November 20, 1816, on these claims, is a disclaimer of jurisdiction, and no more. That opinion has never been taken into consideration or sanctioned by Congress; it is therefore of no weight with the court, who must examine for themselves whether indeed the act of April 12, 1814, did confirm Liotaud's claim. And by examining that act it will appear beyond argument that the opinion of the register and receiver was erroneous.

The confirmatory provisions of that act are contained in the first and second sections. They confirmed only claims which were embraced in previous reports of commissioners, or registers and receivers, and which were based on incomplete French or Spanish grants or concessions, or warrants or orders of survey, which had been filed in the proper offices, and when it appeared by the report of the commissioners, or registers and receivers, that the concession, warrant, or order of survey contained a special location, or had been actually located or surveyed before the 20th of December, 1803. None of the various kinds of claims confirmed by that act resembles Liotaud's.

3d. General Lafayette's patent was issued in strict compliance with the acts of Congress relating to this subject. He was first to locate the land, then have it surveyed, and on the presentation of the survey, together with the certificate of the register, stating that the land is not rightfully claimed by any other person, the patent was to issue. On the survey in evidence in this claim, the land involved in this suit is represented as vacant.

But the defendant contends that the register was mistaken, that the certificate should have shown that this land "was rightfully claimed by Liotaud," and that his rights could not be defeated by the register's error.

It is more than probable that the register, when he gave that certificate, discovered that his error was in having expressed, in 1816, the opinion that Liotaud's claim was already confirmed. And having discovered this error, it was his duty to state that this land was vacant.

4th. If it was true that Liotaud's claim was confirmed by the act of May 11, 1820, and had it been patented, it would yet have to give way to General Lafayette's patent. Liotaud could only obtain a confirmation and a patent in defiance of law. "If the patent has been fraudulently obtained, or issued against law, it is void." Stoddard et al. *v.* Chambers, 2 Howard, 318. If a confirmation has been fraudulently obtained, no certificate of survey will be issued, and the patent will be withheld. Opinion of Attorney-General Wirt, of November 25, 1824, Collection of Laws, Opinions, and Instructions relating to the Public Lands, Vol. II. p. 24. Opinion of Attorney-General B. F. Butler, of July 31, 1839, Ibid. p. 1040. Such a confirmation, such a patent as are here hypothetically assumed to have taken place, could only be the result of fraud. It was a fraud on Liotaud's part to present his petition as giving him a claim to land, and to rely upon the register and receiver's ignorance of the Spanish language. If those officers had recommended such a claim for confirmation, it would also on their part have been either fraud, or such gross negligence as the law assimilates to fraud. Intending not to act on this claim or recommend it for confirmation, they examined it perhaps very hastily, and allowed themselves the more easily to be misled by Liotaud's misrepresentations.

5th. Had Liotaud's claim been confirmed, either by the act of April 12, 1814, or by that of May 11, 1820, it would yet not have severed the land from the domain, for the claim is indefinite and its location uncertain, it never was surveyed, and no plan was filed with it when the confirmation was claimed. It was a claim for six arpents front on the left bank of Canal Carondelet, with the ordinary depth, if that depth could be found, bounded on one side by the land of Carlos Guardiola, and on all the other sides by public land. "Until a concession is located, it can give no claim to any specific tract of land." Bissell *v.* Penrose, 8 Howard, 341.

The description in the claim would permit its location on one side of Guardiola's land as well as on the other. Guardiola owned two arpents front on Canal Carondelet, running back between parallel lines to Gravier's plantation; this strip of land is nearly parallel to the real line of the city of New Orleans, and half a mile distant from it. If Liotaud's claim was located on the city side of Guardiola's land, it would conflict with General Lafayette's 114 acres; if located on the other side, no conflict would exist between those parties. The direction of the said lines and the extent of the claim are equally uncertain. Nor is the obscurity of the claim removed by possession, for Liotaud never exercised any act of possession, and

the plaintiff in error was the first to attempt equivocal acts of possession, the land being all swamp.

This case falls under the principles discussed in Bissell *v.* Penrose, 8 Howard, 332. There a New Madrid patent was declared void, because it had been located upon land duly claimed under a Spanish concession, and therefore withheld from sale. And it was admitted that, if the Spanish concession had not been located by a survey, the patent would have prevailed; in other words, the land would have been considered as public property not detached from the domain. Whether the act of Congress, by which a claim is confirmed, requires the issuing of a patent or not, a definite designation by a survey is equally necessary to separate the land from the domain and deprive the United States of the right of disposing of it. Such has also always been the doctrine of the Supreme Court of Louisiana. In the present case that court said (3 Annual Reports, 61): "This location, unsupported by any survey, or by actual possession, before the change of government, would be too indefinite and uncertain to prejudice the plaintiffs in error [here the defendants]. We take the rule to be, that, in order that the confirmation may have the force and effect of a patent, the description in the inchoate title, or in the act of Congress, must be such as will identify the land. If it will fit another place better, or equally well, it is defective, and will not protect the holder who can show no original possession against a subsequent location, made under the authority of Congress." See also Lefebvre *v.* Comau, 11 La. Rep. 321.

Mr. Justice WAYNE delivered the opinion of the court.

The plaintiff in error having claimed the land in dispute under an act of Congress, and the construction of that act by the Supreme Court of Louisiana having been against the claim, the case is brought here under the twenty-fifth section of the judiciary act of 1789, to have the opinion given in that court reviewed by this tribunal.

The question presented is, whether or not the claim of Louis Liotaud for a tract of land situated in the Eastern District of Louisiana was confirmed by the act of Congress of the 11th of May, 1820 (3 Stat. at Large, 573), against any claim to the land by the United States, so that an entry could not be made upon it in favor of Major-General Lafayette.

The plaintiff in error claims under Liotaud. That claim will be found in 3 American State Papers, Public Lands, 224.

It is, "that Louis Liotaud claims a tract of land, situated in the county of Orleans, on the left bank of the Canal Carondelet, leading to the Bayou St. John, containing six arpents in

front, and forty in depth, and bounded on one side by lands granted by the Spanish government to Carlos Guardiola, and on the other side by vacant lands. This tract of land is claimed by virtue of an order of survey dated in the year 1802." This memorandum is found in the report of the commissioners for ascertaining and adjusting claims to land in the eastern district of the State of Louisiana. It was transmitted to Congress on the 16th of January, 1817, by Josiah Meigs, the General Land Commissioner. 3 American State Papers, Public Lands, 222.

The claims were divided into three general classes:—

1. Such as stand confirmed by law.

2. Those which the register and receiver thought ought to be confirmed.

3. Such claims as in their opinion could not be confirmed under existing laws.

The first class comprehended three species of claims:— 1. Such as were founded on complete titles, granted by the French or Spanish governments. 2. Claims resting upon incomplete French or Spanish grants or concessions, warrants, or orders of survey, granted prior to the 20th of December, 1803. 3. Claims rejected by a former board of commissioners, merely because the lands claimed were not inhabited on the 20th of December, 1803.

Liotaud's claim is put by the register and receiver in the second species. 3 American State Papers, Public Lands, 224.

This report was acted upon by Congress. It declared that "the claims for lands within the eastern district of the State of Louisiana, described by the register and receiver of the said district, in their report to the Commissioner of the General Land-Office, bearing date the 20th of November, 1816, and recommended in the said report for confirmation, be, and the same are hereby, confirmed against any claim on the part of the United States." Act of May 11, 1820, ch. 87, § 1 (3 Stat. at Large, 573).

The register and receiver had said in their report, that all the claims included under the second species of the first class were already confirmed by the act of Congress of the 12th of April, 1814. In this they were certainly mistaken, as they were also in placing Liotaud's claim in what was termed in their report the second species of the first class of claims.

The record does not contain a copy of the order of survey in favor of Liotaud, mentioned by the register and receiver, dated as they say in the year 1802. Nor is there in it either of those documentary papers, uniformly given by the intendants-general of Spain when grants of land were made. We have not

before us either a grant or order of survey in favor of Liotaud. Nothing to make the claim an inchoate right, upon which a title could be enlarged, in favor of Liotaud. Indeed, we do not know any thing from the record about it, and all that we do know of the claim is the memorandum of the register and receiver already recited. That discloses that the order of survey mentioned had been given after the cession of Louisiana by his Majesty to the republic of France. Register Harper and Receiver Lawrence say in their report that Liotaud's claim is founded on an order of survey dated in the year 1802. Apart from the consideration that the order for a survey is dated after the time when Spain had parted with her political sovereignty to grant land in Louisiana, there is no proof of any thing having been subsequently done by Liotaud, or by any official of Spain, to give to Liotaud even an inchoate equity to the land. The claim, then, could not be rightfully, nor was it understandingly, put by the register and receiver under the second species of the first class of claims of incomplete French or Spanish grants or concessions, warrants, or orders of survey granted prior to the 20th of December, 1803.

Liotaud's claim, having been mistakenly put where we find it, it is neither within the letter nor the intention of the act of the 11th of May, 1820, confirming titles to land described by the register and receiver. Congress meant to confirm claims to land under some documentary right from France or Spain, and not claims by persons without any such proof. Liotaud's claim, then, under which the plaintiff in error asserts his right, does not interfere with the patent for the same land issued by the United States in favor of Major-General Lafayette. It is admitted in the case, that the defendants in error have acquired the rights of General Lafayette to the lands in dispute. All of us think that there was no error in the judgment of the Supreme Court of Louisiana, and its judgment is affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed, with costs.

AMBROSE LECOMPTE, APPELLANT, v. THE UNITED STATES.

Where the petition for a Spanish concession was for a tract of land without any definite boundaries, and the petition was referred to the solicitor-general, with instructions to put the petitioner in possession, if in so doing no prejudice would result to third persons, this condition required some subsequent action of the government in order to make the grant absolute.

A part of the duty of the solicitor-general was to supervise the severance of the object to be granted from the royal domain, and apportion the extent of the grant to the means which the petitioner possessed towards carrying out the objects of the government.

The preceding decisions of this court have established the doctrine, that, in order to constitute a valid grant, there must be a severance of the property claimed from the public domain, either by actual survey or by some ascertained limits or mode of separation recognized by a competent authority.

In the present case, the proof of occupation, settlement, or cultivation is insufficient.

THIS was an appeal from the District Court of the United States for the District of Louisiana.

Lecompte claimed under D'Artigau by a chain of title which it is not necessary to set forth.

On the 31st of July, 1797, D'Artigau presented the following petition to José Maria Guadiana, then lieutenant-governor and civil and military commandant of the post of Nacogdoches: —

"Don Juan Baptiste D'Artigau respecfully begs leave to state to your Excellency that he desires to establish a stock farm, to raise horses, mares, and horned cattle, at the place called Lianacoco, within this jurisdiction; for said object, he prays your Excellency will please grant him two leagues square of land at the above-mentioned place, so that in these two leagues be included or embraced the entire prairie of Lianacoco. The petitioner solicits this grant for himself, his children, and assigns, and, from your well-known sense of justice, he hopes to obtain it.

(Signed,) J. B. D'ARTIGAU.

"*Nacogdoches*, 31*st July*, 1797."

And on the same day the lieutenant-governor issued the following order: —

"*Nacogdoches*, 31*st July*, 1797.

"Let this petition be handed to the solicitor-general of this place, in order that the petitioner be placed in possession of the land therein mentioned, if in so doing no prejudice can result to any third party.

(Signed,) GUADIANA."

The claimant alleged that possession was taken by the grantee, and continued by those who held under him until the commencement of the suit.

This claim was twice reported upon by the commissioners appointed by acts of Congress, once in 1816, and again in 1824.

In January, 1816, the commissioners reported (3 American State Papers, 88) that Madame Louise Porter filed with the board of commissioners her claims, as assignee of D'Artigau; also the testimony of Gaspard Boudin, taken before the board, that, about thirteen or fourteen years ago, (viz. about 1802 or 1803,) Madame Monet had possession of this land in exchange for another tract with D'Artigau, and that she put Jaques, an Englishman, on it, and that it had been inhabited and cultivated ever since.

The board, at page 91, report, that this tract is, with others emanating from the Spanish authorities at Nacogdoches, west of Rio Hondo, in the disputed territory; that they have had no means of acquiring satisfactory information of the powers and authorities of the Spanish officers at that place, and therefore decline a decision upon those claims.

On the 3d of March, 1823, Congress passed an act (3 Stat. at Large, 756, ch. 30), relative to claims in this tract of country, between the Rio Hondo and Sabine River, called the neutral territory.

The first section adds the country "situated between the Rio Hondo and the Sabine River, within the State of Louisiana, and, previously to the treaty of the 22d of February, 1819, between the United States and Spain, called the Neutral Territory," to the district south of Red River, requires the register and receiver to receive and record all written evidences of claims to land in that neutral country, "derived from, and issued by, the Spanish government of Texas, prior to the 20th of December, 1803, according to the regulations as to the granting of lands, the laws and ordinances of said government, and to receive and record all evidences of claim founded on occupation, habitation, and cultivation, designating particularly the time and manner in which each tract was occupied, inhabited, or cultivated, prior to, and on, the 22d day of February, 1819, and the continuance thereof subsequent to that time, with the extent of the improvement on each tract, and to receive and record such evidence as may be produced touching the performance of the conditions required to be performed by any holder of any grant, concession, warrant, or order of survey, or other written evidence of claim, and on which the validity of such claim may have depended under the government from which it emanated; and to receive and record all evidence of fraud in obtaining or issuing the written evidence of such claims, and of their abandonment or forfeiture."

Section second required the register and receiver to transmit to the Secretary of the Treasury a record of all the claims presented, and the evidence appertaining to each claim; the claims to be arranged in four classes: —

1. A specification of complete titles, transfers, &c., where the conditions have been complied with.

2. All claims on written evidence not embraced in the first class, where the conditions on which the perfection into complete titles depended, according to the laws and ordinances of the Spanish government, are shown to have been complied with.

3. All claims founded on habitation, occupation, or cultivation, previously to the 22d of February, 1819, and in the manner which would have entitled the claimants to a title under the government exercising the sovereign power over that tract of country, and which in their opinion ought to be confirmed.

4. Those claims which, in the opinion of the register and receiver, ought not to be confirmed:

"Provided, that nothing contained in this act shall be considered as a pledge on the part of Congress to confirm any claim thus reported."

By a supplementary act, approved the 26th of May, 1824 (4 Stat. at Large, 65, ch. 182), the powers given, and duties required of, the register and receiver of the land-office south of Red River, in the State of Louisiana, by act of the 3d of March, 1823, ch. 30 (the act above recited), be extended to all that tract of country called the Neutral Territory, "lying east of the present western boundary of Louisiana, and west of the limits to which the land commissioners have heretofore examined claims to land in said State; and in the examination of claims to land within the aforesaid limits, the register and receiver shall in all respects be governed by the provisions of said act."

In November, 1824, these commissioners made a report, which was communicated to the Senate by the Secretary of the Treasury, on the 31st of January, 1825. (4 American State Papers, 69, claim 230.)

This report shows the powers, customs, and usages of the lieutenant-governors and commandants of the Spanish Province of Texas to grant lands as far back as 1792; then special instructions came, which were deposited among the public records; they were not limited to any specific quantity, but it was their duty to apportion the quantity to the circumstances of the individuals asking concessions; "to proportion their grants to the property, force, stock, and merit of the individual asking the grant."

"The *procurador del comun* was the officer appointed to make inquiry, put the petitioner in possession of the land prayed for, and execute the lieutenant-governor's and commandant's orders relative to the premises."

The lieutenant-governors and commandants of Nacogdoches were "not limited in the granting of lands to any specific quantity, but it was their duty to proportion the extent of the grants to the circumstances of the individual claiming them, and to that effect the *procurador del comun*, named to put the party in possession, inquired into the merits and circumstances of the applicant; and if the grant was for a stock farm, it was customary to extend the concession to two, three, and four leagues square, according to the wants and merits of the claimant."

"All grants signed and confirmed by the lieutenant-governor or commandant, executed in due form, were considered as vesting a complete title in the claimant, without any further process, and were recognized as such by the Governor of the Province, particularly by Governor Salcedo in 1810, when at Nacogdoches making his provincial visit."

"The limits of the late Neutral Territory, as considered by ancient authorities of Texas and Louisiana, comprehended all that country lying east of the Sabine, west of the branch of Red River called Old River, southwest of Arroyo Hondo, and south of Red River, to the northwestern boundary of the State of Louisiana."

"The inhabitants of the Neutral Territory were recognized as belonging to the jurisdiction of Nacogdoches; and the Spanish authorities considered their right of civil jurisdiction not taken away by the arrangement between General Wilkinson and Governor Herrera in the year 1806; yet it was seldom exercised or enforced."

"The public archives and records of the jurisdiction of Nacogdoches are not at that place at present; they were removed and carried off by John Jose Montero, in 1812, then commanding at Nacogdoches, when he abandoned that place," — "and were destroyed at San Antonio, where said Montero carried them."

Such is the substance of the testimony taken by the commissioners, and reported more at large in that volume, pp. 34, 35, and 36.

At page 69. claim 230, the commissioners report the claim of John Baptiste Lecompte, lying in the Neutral Territory, founded on the concession to D'Artigau, before set forth, containing, by the plat and survey by Joseph Irwin, a deputy surveyor of the United States in 1813, and filed with the claim,

two leagues square, or 23,507 acres; which concession "was signed by the commandant of Nacogdoches, dated 31st July, 1797, in favor of Jean Baptiste D'Artigau for the land claimed, transferred by said D'Artigau to Marie Louise Lecompte, Dame Porter, by act of exchange, dated ———, and by said Dame Porter transferred to the claimant by act of sale, dated the 19th of June, 1813; claimed also in virtue of habitation, occupation, and cultivation for more than thirty-three years."

The claim is further supported by the following testimony, taken before the board: —

"Gaspard Boudin: That the land has been constantly and uninterruptedly inhabited, occupied, and cultivated by those under whom the claimant, J. B. Lecompte, holds, by the claimant, and for his use by others, for more than thirty-three years preceding this date." (That is, preceding this sitting of the commissioners.)

"We are of opinion this claim ought to be confirmed, and in the abstract have classed it with claims of second class." (Viz. incomplete grants, "where the conditions on which the perfection thereof into complete titles may have depended, according to the laws and ordinances of the Spanish government, are shown to have been complied with.")

In May, 1846, Lecompte filed his petition in the District Court of the United States (under the act of Congress of 1844 so often spoken of), setting forth the grant, the order of survey, possession under it, and a deduction of title from D'Artigau to the petitioner. An answer was filed by Mr. Downe, District Attorney of the United States, denying generally all the facts and allegations of the petition. Afterwards, by leave of the court, the following supplemental petition was filed: —

"The supplemental petition of Ambrose Lecompte, the plaintiff in the above-entitled suit, with respect represents, that the warrant and order of survey and grant legally made and issued to J. B. D'Artigau as aforesaid, in the original petition, was such as might and could have been perfected into a complete title under the laws, usages, and customs of Spain, had not the sovereignty of the country been changed; that the same was secured by treaty stipulations, and was and is good and valid under the law of nations, and by the several acts of Congress."

Much testimony was taken, which cannot very well be condensed, and in November, 1847, the cause came on for trial, when the court pronounced the following judgment: —

"The court having taken this cause under advisement, and having maturely considered the same, and it appearing that

the petitioner has not sustained, by the evidence offered, the validity of his claim against the United States to the land set forth in his petition, it is therefore ordered, adjudged, and decreed, that the suit be dismissed at the cost of the plaintiff.

"Judgment rendered 22d November, 1847.

"Judgment signed 15th December, 1847.

(Signed,) THEO. H. McCALEB, [SEAL.]
U. S. Judge."

Lecompte appealed to this court.

The case was argued by *Mr. Crittenden* (Attorney-General), for the United States. No counsel appeared for the appellant, but the record contained the following note of authorities filed by the counsel for the petitioner in the District Court.

Note of Authorities, filed October 26th, 1847.

"AMBROSE LECOMPTE *v.* THE UNITED STATES.

"The plaintiff in this case claims four leagues of land at a place called Lianacoco, in the late Neutral Territory, by virtue of a grant executed by Guadiana, commandant of the post of Nacogdoches, in favor of J. B. D'Artigau, who transferred the same to Marie Louise Lecompte, Dame Porter, from whom plaintiff acquired title.

"1st. The original title of the plaintiff is inchoate, but is such as under the court of Spain would have ripened into a perfect title, and should therefore be confirmed. Delassus *v.* United States, 9 Peters, 129, 134; Land Laws, ed. 1828, pp. 532, 548, 843.

"2d. The grant in question has by its terms a special location, to wit, so as to include the whole of the Prairie Lianacoco. 10 Peters, 340. Query, Was not this claim confirmed to the extent of one league by the act of Congress of the 12th of April, 1814 (Land Laws, ed. 1828, p. 651), and the act of the 29th of April, 1816 (p. 701)? 3 Howard, 788.

"3d. Inchoate titles were transferable. Chouteau's Heirs *v.* United States, 9 Peters, 144. Transfers of land could be made by parol under the Spanish law, and parol proof of such transfer is therefore admissible. Sanchez *v.* Gonzales, 11 Martin, 207; Gonzales *v.* Sanchez, 4 Ibid. N. S. 657; Le Blanc *v.* Viator, 6 Ibid. N. S. 257; Maes *v.* Gillard's Heirs, 7 Ibid. N. S. 317; Ducrest's Heirs *v.* Bijeau's Estate, 8 Ibid. N. S. 197; Sacket *v.* Hooper, 3 La. Rep. 107.

"See generally in this case 'extracts from the code of Spanish laws,' Appendix Land Laws, ed. 1828, p. 967; extract of the report of Valentine Ring & Co., Appendix Land Laws, 1039.

(Signed,) P. A. MORSE, *Plaintiff's Attorney.*"

Mr. Crittenden, for the United States.

This claim originated in 1797, when Spain held undisputed domain and jurisdiction of the whole territory between the Rio Hondo and the Sabine River. The dispute about the domain and jurisdiction arose after the United States acquired Louisiana from France, under the act of retrocession of Louisiana by Spain to France. Spain denied that Louisiana included the territory between the Rio Hondo and the Sabine River. The controversy about this territory was adjusted by the treaty between the United States and Spain in 1819, which contained the provisions before mentioned in reference to private rights and interests derived from the lawful authorities of Spain before the 24th of January, 1818.

The following objections to this claim are apparent:—

I. It does not appear that D'Artigau ever handed his petition, with the indorsement thereon by Guadiana, to the *procurador del comun*, as required by the order of Guadiana, and by the laws, customs, and usages of Spain; and the *procurador del comun* never did inquire into "the property, force, stock, and merit" of D'Artigau, nor proportion nor apportion to him, nor put him in possession of, any part of the land petitioned for; which action by the *procurador del comun* was a condition precedent and indispensable to the validity of the claim.

II. There is no proof that D'Artigau ever had possession of a single arpent, or ever farmed, cultivated, or improved any part of the land petitioned for, or did, or caused to be done, any act whereby to acquire to himself in private right, as severed from the public domain, any definite quantity, or any specific tract, of land.

III. The Prairie Lianacoco (as represented on the plot exhibited as document No. 10) is in length about twelve hundred and forty perches, and in average width about two hundred and four perches, in area not exceeding sixteen hundred American acres; but the quantity claimed is to the amount of 23,705 American acres, equal to 27,777 superficial arpents of Spanish measure. Such being the area of the prairie, it was uncertain whether the *procurador del comun*, upon an examination as to "the property, force, stock, and merit" of D'Artigau, would have put him in possession of the whole of the prairie, and if not of the whole, of what part. And as to the quantity of two leagues square, including the prairie, the locality thereof was uncertain and vague, especially requiring the official act of the *procurador del comun* to give the claim a fixed locality, a precise certainty, so that the adjacent residuum might be known as subject to be granted to others.

The surveys which might be made of two leagues square

about and including this prairie are various and indefinite. Of squares, each side measuring four hundred and eighty-five chains (of four poles each), one might be made barely including the east end of the prairie at the middle of that eastern boundary, and extending due west; a second might be made including the west end of the prairie, at the middle of that western boundary, and extending due east; a third might be made including the points midway between the eastern and western ends of the prairie, within and at the middle of the southern boundary, and extending due north; a fourth might be made including the point midway between the eastern and western ends of the prairie, at and within the middle of the southern boundary, and extending due south; a fifth, as represented on plat exhibited, document 10, beginning at the point A, near the western end of the prairie, thence south fifty degrees east, 204 four-pole chains; thence north forty degrees east, 484 chains; thence north fifty degrees west, 485 chains; thence south forty degrees west, 484 chains; thence south fifty degrees east, 281 chains, to the beginning; all and every one to include the whole of the Prairie Lianacoco, yet including very different lands outside of the prairie. Square figures, varying from the cardinal points of the compass, and including the prairie nearer or more remote from this angle or that, might be multiplied at pleasure, each one answering as fully and as perfectly as any other to the prayer of D'Artigau's petition, "so that in these two leagues be included or embraced the entire prairie of Lianacoco."

This wandering uncertainty in the petition and order thereon made to the *procurador del comun* would keep in suspense more than one hundred thousand acres around the prairie, as subject to be surveyed for D'Artigau, until the *procurador del comun* had exercised his functions and performed his duty, in giving a precise quantity and definite locality by a survey of the land, and putting D'Artigau in possession according to the metes and bounds of the survey. This uncertainty illustrates the propriety of Guadiana's order to the *procurador del comun*, and the necessity that he should have performed his duty before D'Artigau could have had a valid right and interest in any defined quantity, or in any fixed location of land.

IV. The document No. 10, exhibited by complainant, which he has called a survey made "by the proper authority under the government of the United States," is not entitled to any such appellation, nor to any legal effect or consequence.

The claimant at whose request Erwin made that survey and plat is not stated; it does not profess to have been made by virtue of any warrant, order of survey, or legal authority; it is

not an official paper; it was never returned by him to any office as an official act done by one lawfully deputed to do the act; it has never been acknowledged by the government of the United States, or by Spain, as an official act or authorized survey. Erwin had no authority from or under the government of the United States to make the survey; it does not appear whose deputy Erwin was; it does not appear by any evidence in the cause that Erwin was even in the employ of the United States as a deputy surveyor; certainly he was not authorized to make surveys upon Spanish concessions.

That document cannot be regarded in any other light than as a private, unofficial act, done by Erwin at the request of some private person, whose name he has not given, and for what purpose he has not stated.

V. There is no legal evidence to show that D'Artigau ever agreed to transfer, or did transfer, his claim to Marie Louise Lecompte, Madame Monet, Dame Porter; the proof relied on in that respect is totally defective as to time, place, circumstance, and competency. D'Artigau had not a transferable interest; there is no evidence to prove that Marie Louise Lecompte, Dame Porter, ever was accepted or acknowledged by the authorities of Spain as the assignee of D'Artigau; the *procurador del comun* never examined into her "property, force, stock, and merit," nor proportioned the quantity of land which she should have as assignee of D'Artigau, nor was she accepted in the place and stead of D'Artigau.

VI. How much land was improved, cultivated, fenced, and actually occupied by Marie Louise Lecompte, Dame Porter, or by those claiming under her, does not appear; and mere possession cannot be allowed to give right and title against the government of Spain or of the United States.

Recopilacion (White's), p. 83, "Of the Capacity of the Thing," and pp. 85, 86, "Of Time Immemorial as necessary to prescribe."

VII. This claim is not valid by the laws of Spain, is not protected by the treaty of 1819, nor by the law of nations. The condition annexed by the laws of Spain to the order and concession of Guadiana was never fulfilled. This is an attempt by Marie Louise Lecompte and the complainant to set up the derelict abandoned claim of D'Artigau, who died in 1799 or 1800, without having presented the order of Guadiana to the *procurador del comun*, without having acquired any valid right or title to an acre of the land alluded to in his petition.

VIII. This claim is invalid according to the principle settled by this court in the cases of U. States *v.* King, 3 Howard, 786, 787; U. States *v.* Forbes, 15 Peters, 183, 184; Buyck *v.* U.

States, 15 Peters, 225; O'Hara *v.* U. States, 15 Peters, 281, 283; U. States *v.* Delespine, 15 Peters, 334, 335; U. States *v.* Miranda, 16 Peters, 160, 161.

This court cannot know what quantity of land the *procurador del comun* would or ought to have assigned to D'Artigau if he had presented Guadiana's order, nor the local identity which he would have given. The courts of the United States cannot relieve against such a palpable neglect of the claimant, such a primitive uncertainty as to the quantity of land, and such a radical defect of specialty.

Mr. Justice DANIEL delivered the opinion of the court.

This is an appeal from a decree of the District Court of the United States for the District of Louisiana, pronounced on the 22d of November, 1847, dismissing the petition of the appellant, filed under authority of the act of Congress of June 17th, 1844, and by which was claimed of the United States a tract of land situated in Louisiana of four square superficial leagues, or about 23,705 American acres.

The appellant, as the heir of Marie Louise Lecompte (also styled Dame Porter and Madame Monet), and as heir of his late father, Jean Baptiste Lecompte, bases his claim upon the following statements. He asserts that on the 31st of July, 1797, one Jean Baptiste D'Artigau, then an inhabitant of Nacogdoches, presented his petition to José Maria Guadiana, then lieutenant-governor and military commandant of the post of Nacogdoches, asking for a grant of two leagues square, to include the whole of the Prairie Lianacoco, which prairie should (as the petition to the District Court represents) be the centre of the said grant; that on the same day Guadiana did grant and issue his order of survey to the proper officer to put the petitioner D'Artigau in possession, without prejudice to third persons; and that D'Artigau took immediate possession of the above-described lands, and continued to possess, inhabit, and cultivate the same, until he transferred them by an act of exchange to Marie Louise Lecompte. The petitioner next states, that Marie Louise Lecompte transferred the above-described tract of land to Jean Baptiste Lecompte, the father of the petitioner; that there is no one residing upon the land in question except one person, who holds under the petitioner; that no person other than the petitioner claims any part of the land; and that the United States have never to his knowledge sold any part thereof. Such are substantially the averments on which the plaintiff has placed his claim, and we will proceed to examine how far, either intrinsically, or as sustained by any evidence adduced in their support, they entitled the plaintiff to the establishment of that claim.

In considering this petition of the appellant, the circumstance which first strikes the attention is the extreme vagueness of its statements, and indeed its entire omission of facts which on the slightest view would appear indispensable to give validity to this claim. Thus, after setting forth the concession, and an order to the proper officer to cause a survey in order to put the petitioner in possession according to survey, and with due regard to the rights of others, omitting any and every fact or circumstance tending to show a compliance with these directions, and the security they were designed to extend either to the government or to individuals, it is said that D'Artigau took possession, and held the land until he transferred it to another. This vagueness and this omission in the statements in the petition are by no means immaterial, inasmuch as, if permitted, they would in effect dispense with all compliance with the express orders of the granting power, and the terms it had annexed to its bounty; would dispense also with what has ever been deemed indispensable, — some act or recognition showing the separation of the subject granted from the royal domain. And in truth the statement in the petition of the appellant is not consistent with, but in terms as well as in effect conflicts with the order of Guadiana, the Spanish commandant, as filed in support of the appellant's claim. The language of the Spanish commandant is as follows: "Let this petition be handed to the solicitor-general of this place, in order that the petitioner be placed in possession of the land therein mentioned, if in so doing no prejudice can result to third persons." Can this language be correctly construed to signify an absolute, unconditional grant of any specific land or other thing, — such a grant as put an end to, or denied, the superior revising authority and duty of the government to take care both of the rights of the crown and of individuals? So far from it, the authority of the government in relation to both are here expressly reserved. There is nowhere in this record to be found a scintilla of proof, that this order, or the petition on which it was founded, was ever presented to the solicitor-general, or that any act was performed by any functionary of the government severing the land from the public domain, or putting the petitioner D'Artigau, or any other person, in possession of any specific land, so that a boundary or limit could be defined by possession. There is in fact no proof that D'Artigau took possession of any thing certain or specific, or had a right to possess himself of any thing specific.

Again, there seems to be an attempt, by the statement in the petition to the District Court, to give a definiteness to the claim or the right by possession, which the language of

the concession by no means warrants. Thus it is said in the petition, that the application of D'Artigau prayed for a grant of which the Prairie Lianacoco should be the centre. There is no such language in the application presented to the Spanish commandant. That application asked for a grant which might include the prairie above named, but in what part of the grant, whether in relation to the centre or to any of its exterior boundaries, neither in the prayer to the Spanish authorities, nor in the order which followed, can any reference whatsoever be found.

The importance of the omission to aver and to prove a delivery of the order of Guadiana, the Spanish commandant, to the *procurador del comun*, or solicitor-general, and the action of the latter upon that order, is shown in another point of view. In the report of the commissioners for the settlement of land claims in Louisiana, dated November, 1824 (4 American State Papers, 34, 35, and 69), the following regulations are given as those prescribed for the Spanish officers, and practised upon by them in making grants for lands in the district of Nacogdoches: "The lieutenant-governors and commandants of Nacogdoches were not limited, in the granting of lands, to any specific quantity, but it was their duty to proportion the extent of the grants to the circumstances of the individual claiming them, and to that effect the *procurador del comun* named to put the party in possession inquired into the merits and circumstances of the applicant; and if the grant was for a stock farm, it was customary to extend the concession to two, three, and four leagues square, according to the wants and merits of the claimants. The *procurador del comun* was the officer appointed to make inquiry, put the petitioner in possession of the land prayed for, and execute the lieutenant-governor's and commandant's orders relative to the premises." Such, we are told, were the functions and duties of the *procurador* or solicitor-general relative to grants of land in this district. It was he who was to supervise the severance of the object to be granted from the royal domain, to give it form and extent, either by designating ascertained and notorious limits and boundaries, or by directing an actual survey, and by reporting the proceedings he may have directed, for the sanction of his superior. The applicability of the functions and duties of this officer to the case before us is evinced by reference to the character of this application to the government. This was not a prayer for an ordinary portion of land for cultivation, but an application for a wide extent of territory; such an extent as would be proper or requisite only upon the supposition of its necessity for the occupation of a large stock and a numerous

force. The petitioner avows his intention of raising horses, mares, and horned cattle, a purpose requiring an extensive range, if carried into effect in good faith. It became, therefore, peculiarly proper to inquire into the means of the applicant, and into the probabilities of his executing his proffered intentions; as it would be highly detrimental to the Province to permit an individual to retain a large and useless extent of unsettled land, and unjust to other settlers to permit such individual, under a false suggestion, to acquire an extensive property for the mere purposes of speculation. Hence it was, no doubt, that the order of the commandant of even date with the petition was issued, sending the petition to the officer who was to judge of its propriety, and without whose direction there could be neither a severance of the land from the royal domain, nor regular legitimate possession in any one.

These conclusions are in strict accordance with the numerous decisions in this court, which insist on the necessity for the severance of the property claimed from the public domain, either by actual survey or by some ascertained limits or mode of separation recognized by a competent authority. The decisions just referred to, it would be tedious to cite in detail in this place; their effect, however, may be seen in the following perspicuous summary, made by the Chief Justice in the case of the United States *v.* King et al., in 3 Howard, 786, 787, in which he says, speaking of the documentary evidence in that case: "The instruments themselves contain no lines or boundaries whereby any definite and specific parcel of land was severed from the public domain; and it has been settled by repeated decisions in this court, and in cases, too, where the instrument contained clear words of grant, that if the description was vague and indefinite, as in the case before us, and there was no official survey to give a certain location, it could create no right of private property in any particular parcel of land, which could be maintained in a court of justice. It was so held in the cases in 15 Peters, 184, 215, 275, 319, and in 16 Peters, 159, 160. After such repeated decisions upon the subject, all affirming the same doctrine, the question cannot be considered as an open one in this court. The land claimed was not severed from the public domain by the Spanish authorities, and set apart as private property, and consequently it passed to the United States by the treaty which ceded to them all the public and unappropriated lands."

They accord likewise with the decisions of the Supreme Court of Louisiana as reported in 8 Martin, 637, and in 5 Martin's New Series, 110, in the former of which cases the court say: "There is no order of survey; no decree of any kind is given

by the intendant or his representative. The application stands unanswered. Now supposing the parties to be in the situation in which they were before the relinquishment of the rights of the United States, would the plaintiff be able to eject the possessor of the land with such a paper, — a paper which is the act of the party alone, and bears not the slightest intimation of the grantor's pleasure?" And in the latter case the court held, "that a permission to settle, obtained on a *requête*, but not followed by an actual settlement, did not give a right superior to that resulting from an actual settlement without permission, or, in other words, from a naked possession." And in the case of Blanc *v.* Lafayette, decided during the present term, the person from whom the appellant deduced his title had upon a petition to the Spanish intendant obtained an order to the surveyor-general to lay off the land. No report was alleged or proved to have been returned by the surveyor-general upon the petition; and although this claim was favorably reported upon by the commissioners, and although it was insisted upon as having been confirmed by act of Congress of 1814, confirming a particular class of incomplete French and Spanish grants, concessions, warrants of survey, having a special and definite location, yet as this order to survey had not been executed, and as the claim was not sustained by certain and definite boundaries, nor by proof of certain and full possession, the Supreme Court of Louisiana decided, notwithstanding a recommendation by the commissioners and the act of Congress of 1814, that, there being no survey and no definite location or description by possession, such as could create a specific right or title under the Spanish authorities, the recommendation of the commissioners and the act of Congress did not cure these radical defects, nor confirm a title so wholly undefined, and deduced from so defective an origin. The opinion of the court of Louisiana has met the approbation of this court, who have again ratified the principles of that decision in the case of the United States *v.* Boisdoré's Heirs, during the present term.

In the absence of documentary evidence showing any act of the Spanish authorities beyond the first order of the commandant, sundry witnesses have been examined, with the view to supply this deficiency, and to give certainty and definiteness to the claim by proof of occupation. A proper analysis of the statements by the witnesses must exhibit them as coming signally short of the ends for which they have been introduced.

The witnesses Grenaux and Plaisance knew nothing whatever of a grant to D'Artigau, nor of any exchange of property between D'Artigau and Madame Lecompte.

Gaspard La Cour knew D'Artigau. Always understood

that Madame Lecompte obtained the land in exchange with D'Artigau, — but does not know for what it was exchanged; never saw any instrument or other document showing a grant of survey to D'Artigau, or any exchange between the latter and Madame Lecompte; — witness is unable to write.

The evidence most favorable to this claim is that of Prud'homme; but this testimony should be taken subject to the admission of the witness that he is a connection of the claimant. Prud'homme states that he knew D'Artigau more than fifty years ago, — knew that D'Artigau had a large concession (how large he does not state), including the Prairie Lianacoco; knows that D'Artigau transferred this concession to Marie Louise Lecompte in exchange for another tract of land at the Tancock Prairie; is sure that this exchange took place before the establishment of the United States government in Louisiana (the witness gives no date for this transaction). Witness knows that, more than fifty years ago, the plaintiff and those under whom he claimed had possession of the Prairie Lianacoco, as a *vacherie*, and has kept the same up to this time.

Recurring now to this testimony, so far as it is adduced to establish a title by showing specific limits by occupation on the part of D'Artigau, not one of the witnesses proves actual occupation by D'Artigau of any thing. La Cours understood that Madame Lecompte obtained the land (what land is not shown) in exchange with D'Artigau, and even Prud'homme can say no more than that D'Artigau had a large concession including the Prairie Lianacoco, and exchanged it with Madame Lecompte for the Tancock Prairie. Limits, specific quantity, certain descriptions, such as might constitute severance from the royal domain, are then wholly out of the question, so far as these or any of these requisites can be deduced from possession by D'Artigau; — for he never had possession, and could therefore transfer no right resulting from possession to Madame Lecompte, or to any other person. We have already considered how far such a severance could be deduced from the order of the commandant at Nacogdoches.

In the next place, with regard to the possession of Madame Lecompte, or of those claiming under her, relied on as the foundation of title, it will be seen that this evidence is utterly inadequate to any of the purposes for which it is adduced. The utmost that any witness has been able to state on this point is a possession of the Prairie Lianacoco, forming, as is admitted on all sides, but a small portion of the claim insisted upon, and hence not forming a description, either as to quantity, locality, or limits, to direct in ascertaining that claim. And

even with respect to this prairie itself, there is nothing to show its position, extent, or limits, or the actual occupation of the whole or of any specific part of it by the ancestor of the appellant. Upon this subject the record is singularly barren. The only fact we can gather from it, as indicating the extent of the occupation, is one which seems strongly to militate against a right coextensive even with this fragment of the entire claim. The fact here alluded to is the averment in the petition, that there is a single individual residing upon some portion of the land, who holds under the petitioner; but on what portion, or by what metes and bounds, whether within or without the limits of the Prairie Lianacoco, is left wholly to conjecture.

Upon the whole, therefore, we are of the opinion, that neither upon the isolated order issued on the 31st of July, 1797, by the commandant at Nacogdoches, nor by virtue of any fact or testimony adduced for the purpose of showing a right to the land claimed as resulting from occupation, settlement, or cultivation, or from any act of the commissioners, or any law of the United States founded thereupon, has the claim of the appellant been sustained. We therefore adjudge that the decree of the District Court of the United States for the District of Louisiana, dismissing the petition of the appellant, be, and the same is hereby, affirmed.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said District Court in this cause, dismissing the petition of the claimant, be, and the same is hereby, affirmed.

JAMES McCOY, APPELLANT, v. ZACHARIAH RHODES AND HIS WIFE, LUMINDA MONTGOMERY.

Where a bill in chancery alleges that certain lands were entered in the name of a third person, with a view to cover them from the creditors of the person who had entered them, and this allegation is denied in the answer and not sustained by proof, the bill *pro tanto* must be dismissed.

But where the party entered the lands in his own name, and afterwards conveyed them to this third person, but the deed to the third person was not recorded until after a judgment had been obtained by a creditor, and recorded in the parish where the land lies, against the party who made the entry, it will not be sufficient merely to set up in the answer that this third person furnished the money with which to purchase the lands. The equity must be proved.

By the laws of Louisiana, no notarial act concerning immovable property has effect against third persons until it shall have been recorded in the office of the judge of the parish where such property is situated. Therefore, where there was a judgment against the holder of the legal title, rendered in the intermediate time between the execution of a deed and its being recorded, and the judgment was first recorded, the subsequent recording of the deed could not abrogate the lien of the judgment.

The forty-seventh and forty-eighth rules of chancery practice explained.

THIS was an appeal from the Circuit Court of the United States for the District of Louisiana, sitting as a court of equity. It was a bill filed by McCoy against Rhodes and wife, under the following circumstances.

On the 6th of December, 1839, Rhodes purchased in his own name from the United States, under the preëmption law of 1838, and entered at the land-office at Ouachita, Louisiana, the following parcel of land: N. W. quarter of section 29, township 10 north, range 10 east, containing $160\frac{29}{100}$ acres; and paid for the same $1.25 per acre, making in the whole $200.25.

On the next day, viz. the 7th of December, 1839, Rhodes executed a deed for the above property to Eli Montgomery, a resident of the city of Natchez, in the State of Mississippi. The consideration stated in the deed was $1,500 cash. It was executed before Lewis F. Lanney, parish judge and *ex officio* notary public of the parish of Concordia, in Louisiana. This deed, however, was not recorded in the office of the judge of the parish until the 10th of December, 1841.

On the 10th of December, 1839, Rhodes entered at the land-office, in the name of Montgomery, the following pieces of land, viz.: S. W. quarter and west half of N. E. quarter of section 29, $= 240\frac{31}{100}$ acres; S. E. quarter of section 30, $= 161\frac{49}{100}$ acres; N. W. quarter of section 32, $= 160$ acres.

These three parcels were entered, as has just been remarked, in the name of Montgomery.

On the 24th of February, 1840, James H. McCoy obtained a judgment against Zachariah Rhodes in the Ninth District Court in the parish of Concordia for $1,546.27, with interest thereon

at the rate of eight per cent. from the 26th of March, 1839, till paid, and costs.

On the 7th of March, 1840, this judgment was duly recorded in the office of the parish judge and *ex officio* recorder of mortgages in and for the parish of Concordia.

On the 10th of December, 1841, Montgomery recorded the deed which had been executed to him by Rhodes on the 7th of December, 1839, and on the same day executed a deed of the three parcels of land which had been entered in his name, to Thomas J. Ford of Adams County and State of Mississippi. The consideration is stated in the deed to have been the following, viz.: — "The sum of three thousand dollars cash, which the said Eli Montgomery doth hereby acknowledge to have received, and the eight promissory notes of the said Thomas J. Ford, of even date herewith, and payable to the order of the said Eli Montgomery, for the amount and for the time as follows, viz.: First, a note for the sum of eight hundred dollars; second, a note for the sum of one thousand dollars; another note for the same sum of one thousand dollars, and a note for the sum of five hundred and thirty-three dollars thirty-three and one third cents, all payable on the 1st day of January, 1843; next, the two notes of the said Ford for the sum of one thousand dollars each, and also a note for the sum of thirteen hundred and thirty-three dollars thirty-three and one third cents, payable on the 1st day of January, 1844; and lastly, the note of the said Ford for the sum of three thousand three hundred and thirty three dollars thirty-three and one third cents, payable on the 1st day of January, 1845, all paraphed by me, the said notary, '*Ne varietur*,' to identify them herewith, and payable at the office of the judge of the parish of Concordia."

The wife of Montgomery renounced all her rights of dower and rights of every kind in and to the property, which stood mortgaged for the payment of the notes.

On the 2d of November, 1842, Ford conveyed the property to Mrs. Luminda Rhodes, for the consideration of ten thousand dollars. Zachariah, the husband of Luminda, being present, declared that he accepted this act for his said wife, and "duly authorizes and assists her herein."

On the 28th of January, 1845, James H. McCoy, a citizen of the State of Mississippi, filed his bill in the Circuit Court of the United States for the District of Louisiana, against Zachariah Rhodes and Luminda Montgomery his wife. It averred that Rhodes conspired with Montgomery to cheat and defraud the complainant; that the conveyance of the 7th of December, 1839, from Rhodes to Montgomery, was fraudulent

and void; that the entry of the lands on the 10th of December, in the name of Montgomery, was fictitious and fraudulent, and that the whole transaction was intended to benefit Rhodes and defraud his creditors; that Luminda, the wife of Rhodes, was the niece of Montgomery; that the recording of the judgment on the 7th of March, 1840, operated as a judicial mortgage upon all the lands; and prayed for a sale of the lands in order to discharge the judgment.

On the 3d of December, 1845, Rhodes and wife answered the bill. They admitted the entry of the lands, but averred that they were paid for with money actually furnished by Montgomery, and were intended to be his property; that Montgomery afterwards sold the lands to Ford, and that the respondents had no interest or participation therein; that after said sale was made, the notes of the said Ford were paid to this respondent, Luminda Montgomery, by the said Eli Montgomery, for moneys due to her from the estate of her deceased father, Joseph Montgomery, of whom the said Eli Montgomery was executor, or administrator of his estate, and that the said notes being secured by mortgage on all the said lands, and the said Ford having become embarrassed, and unable to pay the same, the lands were taken by this respondent, Luminda, in satisfaction of said notes, by agreement between these respondents and said Ford, and the conveyance made accordingly, for the sole use of this respondent, Luminda.

They then denied all fraud, combinations, deceptions, or cheating, &c., &c.

A general replication was put in and depositions were taken.

On the 24th of January, 1848, the cause came on to be heard on the bill, answers, exhibits, and proofs, when the Circuit Court decreed that the complainant's bill should be dismissed, with costs.

A petition for a rehearing was afterwards filed, alleging that the decree was erroneous, in this amongst other things, that the recording of McCoy's judgment was prior in date to the recording of the deed from Rhodes to Montgomery, by which deed the land entered on the 6th of December was conveyed to Montgomery; the judgment being recorded on the 7th of March, 1840, and the deed on the 10th of December, 1841.

But the court overruled the application for a rehearing, upon which the complainant appealed to this court.

It was argued by *Mr. Butterworth*, for the appellant, no counsel appearing for the appellees.

The points taken by the counsel for the appellant were the following:—

The claim of the plaintiff for a mortgage on the northwest quarter of section 29, which was entered in the name of Rhodes, has three distinct and separate foundations, any one of which is sufficient to support it.

Even if the statement in the answer, that Rhodes entered it as the agent of Eli Montgomery, &c., were true; or if he had transferred it, for a good and valuable consideration, to Montgomery, and in good faith; still, as the legal title did vest in Rhodes, and it was not again divested, as to complainant, by transfer and record thereof, while the mortgage of complainant had, in the mean time, become fixed upon it; under the laws of Louisiana, there is no question that the mortgage-creditor's claim prevails over that of the vendee. (See Act of 1810, in Bullard and Curry's Digest, p. 596, § 7, No. 37. See Adelaide Mary *v.* François Lampré, 6 Rob. 315; 2 La. R. 124; Gradenigo *v.* Wallett, 9 Rob. 16; Carraby *v.* Desmarre et al., 7 Martin, N. S. 661; Duplessis *v.* Boutté, 11 La. R. 346; Lee *v.* Daramon and another, 3 Rob. 162.) But the case of Gravier et al. *v.* Baron et al., 4 La. R. 239, is among the earliest, and is one of the most important, cases on the subject. In that case, the land had been alienated in 1815; in 1824 a judgment was obtained against the vendor, which was recorded in the parish of St. Mary's, where the land lies. The public act of sale made in 1815 had not been recorded in St. Mary's parish before the judgment was there recorded. The claim of the creditor was, in that case, preferred to that of the vendee.

The English law, we know, is otherwise; but the decisions of our Supreme Court, on the construction of our statute law, which is a local law of property, must govern the case. The inconvenience of two different constructions, diametrically opposite, of the same local law of property, has ever been appreciated by this court; and doubtless it will be regarded in this case.

But the fact is, the assertion in the answer, that Rhodes was the agent of Eli Montgomery in making the entry of said quarter-section, is absolutely false, as appears from the record. He made that entry in virtue of the act of Congress of the 22d of June, 1838, granting preëmption rights to actual settlers, &c.

He was required, by the terms of the act of 1838, to swear that he actually settled on the land, occupied, and entered it for himself alone, and for no one else. (See 5 Statutes at Large, 251.) The register and receiver swear that he did enter the said quarter-section in virtue of his preëmption right, under said act of 1838.

The depositions of the register and receiver, &c., taken in connection with the requirements of said act, are conclusive against yielding any credit whatever to the answer of defendants. We must beg leave to remark, however, that, if false statements are made in the answer, no perjury is thereby committed by Mrs. Luminda Montgomery, as she has not sworn to her answer at all. It was sworn to only by Rhodes, the other defendant.

It being established, then, that this land was entered by Rhodes for himself, in virtue of his preëmption right, under the act of 1838, of course there can be no pretence for insisting on the validity of the transfer of said quarter-section by Rhodes to Eli Montgomery. The answer says it was made in pursuance of a previous agreement to that effect. If any such previous agreement existed, and yet the land was entered according to law, the agreement was corrupt, and in violation of law, and the conveyance made in pursuance thereof is void to all intents and purposes.

Any thing done in violation of a prohibitory law (says our Louisiana Code, Art. 10) is null.

The same thing has ever been maintained in the courts of England and in this court. See Bank of United States v. Owens, 2 Peters, 538.

That no value passed from Montgomery to Rhodes for this transfer is too apparent, from all the circumstances of the case, to admit of a doubt.

The deed says, it is true, that the consideration of the transfer was $1,500 cash, in hand paid; but the answer negatives the existence of any such thing; it says, the entry was made by Rhodes, as the agent of Montgomery, and the transfer was made in pursuance of a previous agreement, without stating what was the consideration of the previous agreement; while the depositions of the register and receiver, and the documents attached to them, prove conclusively that Rhodes was entitled to enter said quarter-section in virtue of the preëmption granted him by the act of 1838, and that he did so enter it.

All this certainly proves, that no consideration ever passed from Montgomery to Rhodes, for said sale and transfer of said northwest quarter of section No. 29, T. 10, R. 10.

It must be apparent, then, that the said quarter-section, by the entry thereof in the name of Rhodes, on the 6th of December, 1839, in virtue of his preëmption right under the act of 1838, vested in him all the title, both legal and equitable, to said tract of land. It is also equally apparent, that no consideration was given by Eli Montgomery for the transfer thereof to him, in December, 1839; and also, that, even if said transfer

had been made for a good, adequate, and valuable consideration, and in good faith, yet, under the laws of Louisiana, in consequence of the failure to record the deed in Concordia until long after the judgment of complainant had been there recorded, it was of no validity whatever as to the rights of complainant, as to whom the said sale is the same as if it had never been made. See 6 Robinson, 315.

What has been said above is peculiar to the lot or quarter-section of land entered in the name of Rhodes.

We have some things still to say, which are alike applicable to all the lands on which complainant claims a mortgage.

In the answer, it is stated that the notes of Ford were paid by Eli Montgomery to Luminda Montgomery, in satisfaction of moneys due her from her father's estate, &c.; and that these notes were given by her to Ford, as the price of the transfer from him to her of the lands mentioned in the bill.

No proof whatever has been offered in support of the allegation of the answer, that the notes were paid by Eli Montgomery to Luminda, in satisfaction of moneys due her from her father's estate. The truth of the answer was put in issue by the replication; and therefore this allegation of the answer requires proof. See opinion of Chancellor Kent, in Hart *v.* Ten Eyck, 2 Johns. Ch. 89, 90, and authorities there referred to:—

"When the answer is put in issue, the defendant must support by proof all the facts upon which he means to insist, while the plaintiff may rely upon every fact admitted, which he conceives material, without being bound to the admission of any others. But when the answer is offered in evidence at law, no part of it is immediately in issue. It is only parcel of the evidence, and if one side introduce it, the other may insist upon the whole being read; and if read, it does not necessarily follow that it must be wholly admitted as true, or wholly rejected as false. The credit of any and every part is left to the jury, who are not bound to believe equally the whole answer, but may believe what makes against, without believing what makes for, the party who swears in the answer. This rule is applicable to every kind of evidence, and has been often acknowledged by the judges at law."

"The distinction, therefore," as Evans says, "is not between courts of law and equity, but between pleadings and evidence. If an answer is introduced collaterally, it ought to be treated precisely as in a court of law," &c.

Here it is admitted by the answer, that the notes were given to Luminda Montgomery; and though stated to be in payment, &c., yet no proof is administered of the indebtedness of Eli Montgomery, and therefore, under all the circumstances of the case, the allegations of fraud seem to be fully proven.

As the matter stands, it is clear that Luminda Montgomery gave no consideration for the notes; and by consequence it is also true that Eli Montgomery gave no consideration for the land.

The conclusion deduced from this rule of evidence, as applicable to this case, is much strengthened by the fact, that an important part of the answer has been disproved by two credible witnesses, and by documents; and therefore the rule applies to the whole answer, that, if a witness is proven to have wilfully sworn falsely in one particular, his whole testimony is discredited.

The truth is, the lands were always, in fact, the property of Zachariah Rhodes, except while the title was in Ford, during which time he held the notes of Ford for the unpaid price. These notes were finally given up to Ford in consideration of a transfer of the land, &c.

But even if it were true, as is stated in the answer, that the notes of Ford were given by Eli Montgomery to Luminda in satisfaction of a just debt due her for moneys coming from her father's estate, still it would form no ground for dismissing the complainant's bill; because the lands were acquired on the 7th of November, 1842, during the existence of the community between the defendants; and although the deed is taken in the name of the wife, and even if the price was paid with the proper funds or effects of the wife, they are still the property of the community. (See Civil Code of Louisiana, Art. 2371: see also 10 La. Rep. 148; Ib. 181.)

If the defendant Luminda Montgomery has applied her proper effects in the purchase of the lands, (which is denied by complainant,) she has a tacit mortgage on all the immovable property of her husband, and on the immovables of the community (which includes these lands), for the satisfaction thereof. This claim she must set up against the complainant (after suit instituted against her husband for separation of property) by original or cross bill, &c.

She has not set it up, nor could she be heard to set it up in an answer.

We think it fully established, then, that, even if the acquisition of the lands was made with the funds of Luminda Montgomery, and the deed taken in her own name, as it was, still she cannot lawfully oppose the foreclosure of complainant's mortgage.

But it is not true that the lands were acquired with her funds or effects. In any form of action against her husband, his heirs, or his creditors, it is indispensably necessary for her to establish, by proof, that the property was acquired with her

funds or effects. This has not been done in this case, nor could it be done, because it is not true.

In the answer it is stated that the debt due complainant was contracted by Zachariah Rhodes prior to his intermarriage with Luminda Montgomery, which took place on the 28th of December, 1834; and that therefore it cannot be satisfied out of the effects of the community.

The record shows, that the judgment of McCoy against Rhodes was rendered on the 24th day of February, 1840, with interest thereon from the 26th day of March, 1839. If the debt was contracted prior to the 26th of March, 1839, it does not appear by any evidence in the record; and the presumption of law is, that that is the date of its origin.

If the fact was otherwise, the respondents should show it by evidence. The answer, as above said, cannot establish the fact.

Since the above was written, we find, on inspection of the papers in the case, in the Circuit Court, that a copy of the record of the suit of McCoy v. Rhodes, in the State court, is on file, and we suppose it was offered in evidence. If this is true, it appears by that record that the debt was contracted by Rhodes on the 12th of August, 1838.

We therefore rely on the following propositions as established: —

1. The land which is designated as the northwest quarter of section 29, in township 10 of range 10, was entered at the land-office, and purchased by Zachariah Rhodes in his own name, and for his own use, from the United States, on the 6th day of December, 1839, in virtue of a settlement thereon, and preëmption right granted him under the act of Congress of 1838, granting preëmption rights, &c.

2. That said quarter-section of land, though nominally conveyed, by public act dated on the 7th day of December, 1839, from Zachariah Rhodes to Eli Montgomery, was, because the conveyance to Montgomery was fraudulent, still actually the property of Rhodes, until the 10th of December, 1841, when it was, at the instance of said Rhodes, conveyed by Eli Montgomery to Thomas J. Ford.

3. That the said transfer to Montgomery did not have any effect as against complainant; because the said conveyance was made without any lawful consideration, and with intention of defrauding creditors; and also because the deed of transfer was not recorded in the conveyance office of the parish of Concordia, until long after the judgment of complainant had been recorded in the mortgage office of said parish, within whose limits, at that time, the land lay.

NOTE. — Since the recording of the judgment of complainant, and since the recording of the conveyance of Rhodes to Montgomery, that part of the then parish of Concordia in which the land lies has been stricken off from Concordia, and it now forms a part of the parish of Tensas.

4. That the entry of the other lands in the name of Eli Montgomery, made by Rhodes on the 10th day of December, 1839, at the land-office at Monroe, was, in truth, an entry and purchase of said lands by said Rhodes for his own use and benefit; and that the use of the name of the said Montgomery was intended as, and was, a fraud upon the creditors of Rhodes; and consequently said lands, from the date of the purchase until the 10th day of December, 1841, (when they were conveyed and sold by Eli Montgomery, at the instance of said Rhodes, to Thomas J. Ford,) remained and continued to be the property of Zachariah Rhodes. That consequently, the judgment of complainant operated as a mortgage on all said lands from the date of its record in the mortgage office of Concordia, to wit, 7th March, 1840.

5. That from the 2d day of November, 1842, when all said lands mentioned in the bill were conveyed by Thomas J. Ford to Luminda Montgomery, the lands all became the property of the community existing between said Zachariah Rhodes and Luminda Montgomery, his wife; and as such, (even if not, before that time, subject to the debt due complainant,) became affected with the mortgage claim set up in the bill.

NOTE. — The division of the parish of Concordia did not take place till 17th March, 1843. See Session Acts of 1843, page 35.

(The judgment of complainant was recorded in Concordia on the 7th of March, 1840.)

6. That the judicial mortgage of complainant attached to, and became fixed on, all the lands mentioned in the bill, from and after the 7th day of March, 1840, the date on which it was recorded.

Mr. Justice CATRON delivered the opinion of the court.

McCoy recovered a judgment against Rhodes, in a State court of Louisiana, for the sum of $1,546, on the 24th of February, 1840; and on the 7th of March following this judgment was recorded in the mortgage office of Concordia parish. The bill seeks to subject certain lands in possession of Rhodes to satisfy the judgment. Three of the tracts were entered as United States lands, in the name of Eli Montgomery, but which the bill alleges were the property of Rhodes, and covered by Montgomery's title to prevent Rhodes's creditors from reaching

them. This is directly denied by the answer, and, there being no proof to the contrary, complainant must fail as respects these three parcels. The bill also seeks to subject a fourth tract, entered by Rhodes (December 6, 1839) in his own name, and conveyed to Montgomery next day, December 7, 1839. This deed was first recorded, in the proper office of Concordia, December 10, 1841; and is for the northwest quarter of section No. 29, T. 10, R. 10 east, containing $160\frac{39}{100}$ acres.

On the 10th of December, 1841, Montgomery conveyed the four tracts to Thomas J. Ford, who afterwards (November 2, 1842) rescinded the contract of purchase, and conveyed to Luminda Montgomery Rhodes, wife of Zachariah Rhodes. Rhodes and wife are the only defendants. In regard to the northwest quarter of section No. 29, they jointly answer and say:—

"True it is that this respondent, Zachariah Rhodes, did, on the 6th day of December, 1839, enter at the land-office at Ouachita, Louisiana, the northwest quarter of section No. 29, in township No. 10 of range 10 east, and that he took a receipt for two hundred dollars and twenty-five cents, the price thereof under the laws of the United States; but these respondents aver that the entry aforesaid was made by this respondent, Rhodes, for Eli Montgomery, of the State of Mississippi; that the said Eli Montgomery did furnish the money to pay for the same, and the same was actually paid for out of the moneys so furnished by the said Montgomery; and that the convevance of the same to the said Montgomery by this responden cde as set forth in the said complainant's bill, was made to compiete the legal title in his, said Montgomery's name, according to the original intent of all parties, and as equity and justice required; this respondent, Z. Rhodes, having only acted as the agent of the said Montgomery, and for his use, in making said entry, and paying the said money; and not with any view to cheat, defraud, or wrong the said plaintiff, as is falsely charged in said plaintiff's bill."

Respondents admit that the entry was made in Rhodes's own name, and was, when made, *primâ facie* liable to be seized on execution as his property; but then, in avoidance of this admitted liability, they allege that Montgomery's money was paid into the land-office, and that this was done in fulfilment of some previous agreement between Rhodes and Montgomery, by which an equity existed in the latter to have the benefit of Rhodes's preëmption right of entry, as an actual settler.

There is no proof in the cause of the facts above set forth by the answer. That Montgomery furnished the money paid, and that the land was entered for his use under a previous

agreement, are facts within the peculiar knowledge of respondents; they are not responsive to charges made by the bill, but set up as an independent defence. In such case the rule is, "that a discharge set up in avoidance, coupled with an admitted liability, if the answer be replied to, (as here it is,) must be proved by the defendant."

This is the settled rule. Hart *v.* Ten Eyck, 2 Johns. Ch. 88; Napier *v.* Elam, 6 Yerger, 112.

As the respondents cannot make evidence for themselves, and thereby establish an equity in Montgomery, it follows that the defence must fail so far as the equity set forth is relied on. Having disposed of this part of the controversy on the pleadings and want of proof, it becomes unnecessary to examine what bearing the act of July 22, 1838, c. 119, (5 Stat. at Large, 251,) has on the foregoing facts.

The next ground of defence relied on is the conveyance made by Rhodes to Montgomery of the 7th of December, 1839. It was recorded December 10, 1841. According to the statute law of Louisiana, no notarial act concerning immovable property has effect against third persons, until the same shall have been recorded in the office of the judge of the parish where such property is situated. In relation to third persons, the act of sale not recorded is considered as void.

For an exposition of the Louisiana statute we refer to the case of Gravier *v.* Baron (4 Louisiana R. 239), and which has been since followed by the Supreme Court of Louisiana. The deed from Rhodes to Montgomery being a notarial act, it took effect on the 10th of December, 1841, against McCoy, the judgment creditor; and as the lien of the judgment, or judicial mortgage, attached the 24th of February, 1840, when the title was in Rhodes the debtor, this deed is of no force as against the judgment, nor are the subsequent deeds founded on it; and therefore McCoy has a right to have the northwest quarter of section No. 29 sold.

Some supposed difficulty exists on the head of jurisdiction for want of parties, Eli Montgomery not being before the court. We do not deem him a necessary party to this suit; he has no interest in the land, and no right to contest the validity of the judgment against Rhodes. And, in the next place, we are of opinion that all necessary parties were before the Circuit Court according to the forty-seventh and forty-eighth rules of chancery practice published by us in 1842, as the bill alleges that Eli Montgomery permanently resided beyond the jurisdiction of the court; which was not contested by plea, nor was any objection made below against proceeding to a final decree for want of parties.

For the reasons stated, it is ordered that the decree dismissing the bill be reversed, and that the cause be remanded to the Circuit Court, there to be proceeded in according to this opinion.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, for further proceedings to be had therein, in conformity to the opinion of this court.

PENELOPE MCGILL, PLAINTIFF IN ERROR, *v.* JOSEPHINE H. ARMOUR.

Where a creditor brought an action against an executrix in the Circuit Court of the United States for Louisiana, and the petition only averred that the petitioner was shown to be a creditor by the accounts in the State court which had jurisdiction over the estates of deceased persons, and then proceeded to charge the executrix with a devastavit, and exceptions were taken to the petition as insufficient, these exceptions must be sustained.

The petition should have gone on to allege further proceedings in the State court analogous to a judgment at common law, as a foundation of a claim for a judgment against the *executrix de bonis proprtis*, suggesting a devastavit.

The laws of Louisiana provide for compelling the executrix to file a tableau of distribution, which is a necessary and preliminary step towards holding the executrix personally responsible. The petition, not having averred this, was defective, and the exceptions must be sustained.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Louisiana.

As the decision turned upon a question of pleading, it is proper to insert the petition, and the exceptions which were taken to it, by way of demurrer.

The petition was as follows.

"To the Honorable the Judges of the Circuit Court of the United States, held in and for the District of Louisiana, the petition of Penelope McGill respectfully shows:

"That she is a resident and citizen of the State of Mississippi.

"That Josephine Hurd Armour is a citizen of the State of Louisiana, resident in New Orleans.

"That Josephine Hurd Armour is indebted to, and became liable to pay to, your petitioner the sum of $7,510.66, with eight per cent. per annum interest thereon, from and after the 6th day of June, 1843, till paid, in the manner following, to wit:—

"On or about the 31st day of August, 1843, James Armour died indebted to your petitioner in the sum of $7,510.66, with interest, as above stated, the items of which debt are set forth in the papers annexed, and marked A and B.

"That, before his death, James Armour promised in writing to pay eight per cent. per annum interest on the funds which petitioner left in his hands, that is, on the sum of $7,510.66, until their payment.

"That, at his death, James Armour left a will, in which he appointed Josephine H. Armour the executrix of the said will, and dispensed with the necessity of requiring her to give security.

"That, on the 11th day of September, 1843, she filed her petition in the Probate Court of the parish of Orleans, praying the appointment of executrix of the last will of James Armour, on which said day she was appointed, and took the oath required by law; and on the 16th day of September, 1843, she was fully authorized to do all acts as executrix of the will of James Armour, and as such took possession of all the property of said James Armour.

"That James Armour, at the time of his death, owned property in New Orleans which was appraised at $70,058.61, and in the parish of Jefferson he owned property which was appraised at $800; all of which came into the hands of said Mrs. Josephine H. Armour as the property of James Armour, deceased.

"That she has used for her own benefit all of said property, except as herein below stated, and has appropriated no portion thereof to the payment of the debts of James Armour.

"That among the property of the said succession of James Armour were found the following described notes: two notes of John Graham, each for $629.06, due on the 1st days of August, 1842 and 1843, payable to and indorsed by Buchanan, Hagand, & Co.; a note of Dougall McCall for $3,803.90, due 7th June, 1841; three notes of C. A. Warfield, for $619.67 each, due two, four, and six months after the 3d day of May, 1841; a note of J. K. Patterson for $550, due on 1st November, 1841; a check of James Pardon, Brother, & Co., on the City Bank of New Orleans, for $100; another check of the same drawers, on the Commercial Bank of New Orleans, for $120; a due bill of William Christie for $250; a draft of Francis D. Newcomb, on Rice Garland, for $75; four promissory notes of Francis D.

Newcomb, all dated 15th December, 1842, each for $954.76, due at six, twelve, eighteen, and twenty-four months after date. All of which several debts were due to James Armour at the time of his death, and have since become worthless and prescribed by means of the negligence of said Mrs. Armour; and all said claims bore interest at the rate of eight per cent. per annum, from their dates till paid.

"That, by means of said negligence, she has made herself liable to the creditors of the said James Armour for the amount of all said claims, $11,760 and interest at ten per cent. from the several dates above mentioned until payment.

"That she received and applied to her own use the family residence of James Armour, valued at $15,000; she sold two lots on Camp Street, near Felicity road, worth $600; the property in the parish of Jefferson, worth $800; the slaves Sampson, Betsy and child, Emily, Esther and child, Sarah, and Calvin, worth by appraisement $2,750; also, the household furniture and plate, carriage, &c., valued at $1,000, making $20,150; all of which she used for her own benefit, and did not pay to the creditors of James Armour any portion of the proceeds, although all said property belonged to James Armour.

"That the said Mrs. Armour owed said succession of James Armour $411.35, at the time of his death. She collected from the various debtors of the estate of James Armour the various sums which are stated in the annexed inventory to be due by the persons therein named, and not hereinbefore set forth, which said several debts amount to fifty thousand dollars.

"That, by receiving the property enumerated in said inventory, as the executrix of her husband's will, she became bound to use all due diligence in collecting the property of said James Armour; and also became bound to apply all the proceeds to the satisfaction of the debts of James Armour.

"That the said property was more than sufficient to pay all the debts of said James Armour, if the said Mrs. Josephine H. Armour had used due diligence in collecting and in paying over the proceeds of the property of said estate.

"That, on the 13th day of December, 1843, the said Mrs. Josephine H. Armour filed, in the Probate Court of the parish of Orleans, a provisional account of the affairs of the said succession, with which she filed a statement of all the creditors of said estate, by which it appears that James Armour owed only forty thousand dollars, to pay which Mrs. Armour had the sum of seventy-one thousand dollars.

"That, in the said list of creditors, your petitioner is named and acknowledged to be a creditor of said succession of James Armour, for the sum sued for herein.

"That, upon opposition made to the said account and list of creditors, it was adjudged that the said estate of Armour owed to your petitioner the said sum of money; as also that the debts of the succession amounted to forty thousand dollars.

"That, by means of the neglect and the misapplication of the funds of said succession, Mrs. Josephine Hurd Armour has become liable to pay the said debt to your petitioner, and also to pay damages to the amount of eight thousand dollars, and eight per cent. per annum interest from 6th June, 1843, till paid.

"The premises considered, petitioner prays that the said Josephine Hurd Armour be cited, and, after due proceedings, that she be condemned to pay your petitioner the sum of $ 7,510.66, with eight per cent. per annum interest from the 6th day of June, 1843, and damages as above stated. Petitioner prays for a trial by jury, and for general relief in the premises.

"STOCKTON & STEELE,
Attorneys for Plaintiff."

In March, 1848, the defendant filed the following exceptions and answer.

"And the said Penelope McGill, by her attorneys, comes into court, and, pursuant to the rules and practice in this honorable court, files now this her exception and answer to said petition.

"She excepts to said petition, and prays that the same may be dismissed without further answer, for these reasons: —

"First. The said petition, and the matters and things therein contained, are not good and sufficient in law to charge this defendant, and show no cause of action against her.

"Second. The said petition is insufficient, for the reason that all parties interested in the further settlement of said accounts therein referred to are not made parties to said petition, and the defendant cannot be called upon by each creditor of the testator to render an account of her actings and doings.

"Third. The said defendant excepts to the jurisdiction of this honorable court, sitting as a court of common law, to determine and adjudge the matters involved in said petition, and says that the same are only cognizable in chancery, and according to the form of proceedings in equity.

"And if the said exceptions should be overruled, and the said defendant be required to make further answer unto said petition, then, for answer to the same, she states: —

"That she denies, generally and specially, each and all of the allegations in said petition contained, except such as are hereinafter admitted. She admits that she was appointed the

executrix of the last will and testament of her deceased husband, James Armour; that she duly qualified as executrix as aforesaid, and took upon herself the administration of said estate.

"She further states, that she has endeavored faithfully and honestly to discharge her duties as executrix, and avers that in all things she has administered the effects of said estate according to law; that she made full, true, and perfect inventory of the property of said succession, and all proper diligence in collecting the debts of said succession; disposed of the property thereof under and in obedience to the order of court; made reports of her actings and doings, and presented formal tableaux of distribution, which were duly approved and homologated by the Probate Court of the parish of Orleans, in which such matters were properly cognizable.

"The said defendant further states, that the said succession of James Armour is and was at the death of the testator utterly insolvent, and that she is a creditor of said estate, recognized as such by the proper tribunal, and entitled to be paid before petitioner; and, although so recognized for a large amount, the assets are wholly insufficient to discharge the said claim; besides many other ordinary creditors, whose claims are equally as meritorious as the petitioner's.

"Wherefore defendant prays for trial by jury, and that judgment be rendered against petitioner; and she will ever pray, &c.

"W. C. Micou,
D. Hunton."

In May, 1848, the Circuit Court, after argument, sustained the exceptions, and dismissed the suit, at the plaintiff's costs. The plaintiff sued out a writ of error, and brought the case up to this court.

It was submitted upon printed arguments by *Mr. Butterworth*, for the plaintiff in error, and *Mr. Benjamin*, for the defendant in error.

The counsel for the plaintiff in error considered that the Circuit Court, by its judgment, had decided the three following points, in each of which there was alleged to be error: — 1st. That no cause of action was shown in the petition; 2d. That no proper parties were made; and 3d. That the suit should have been upon the equity side of the court. But as the decision of this court turned exclusively upon the first point, that one only will be noticed.

First. We think the petition shows good cause of action: no one disputes that an executor is responsible personally to

some one for the value of the property received by him; either for its restoration in kind, or for its value, if the property or its value has been lost by his negligence whilst it remained in his possession. See 11 La. R. 22; 9 Rob. 405, 447; 9 La. R. 49; 3 Martin, N. S. 707; 7 Rob. 478.

This responsibility is directly in favor of the parties for whose benefit the property is received by the executor.

According to the law in Louisiana (and we believe everywhere else) creditors of the deceased have a right to be paid out of the funds in the hands of the executor, in preference to all other persons, whether legatees or heirs. Civil Code, Art. 1627. And they are the parties principally interested in so much of the property as is needed to satisfy their claims; consequently, the account must be rendered to them of the property received, and payment must be made to them, if it is destroyed. No one else is interested in this matter.

Now, the plaintiff has set forth that the defendant received property worth $ 71,000, and that the debts were only $ 58,000; that she has destroyed a large amount of the notes, allegations, &c., by permitting them to become prescribed and worthless; that she has converted to her own use properry worth $ 20,000, and that she has collected debts due to the estate of James Armour worth $ 50,000; that she has paid no one any thing, and that all this money, $ 71,000, was received as funds with which to pay plaintiff's debt, and that there is no other fund from which it can be paid.

There is a tacit or *quasi* contract made by an executor in receiving property of a succession, that he will pay it to the parties to whom it rightfully belongs, that is, first to the creditors, then to the legatees, then to the heirs of the deceased. Plaintiff sets forth that this *quasi* contract has been violated so far as she is concerned, and she asks its enforcement; also, she says the defendant received property to the value of $ 71,000, which property was received by her to pay this very debt, and that by the negligence of the defendant it has partly become worthless, and that she has herself consumed and used the balance, and thus she has damaged the plaintiff to the whole amount of her debt. Thus she shows two good causes of action against the defendant.

The counsel for the appellee replied to this point as follows.

1st. The petition is insufficient.

As the demand is for a judgment *de bonis propriis*, the action is in the nature of a devastavit, at common law.

In order to sustain such a suit at common law, there must be judgment and execution. 1 J. J. Marshall, 362; Erving *v.* Peters, 3 Term Rep. 685.

Action may be brought upon the judgment without execution, upon a suggestion of a devastavit, but it is usual to sue out a *fieri facias*, and state the judgment, writ, and return. 2 Williams on Executors, 1224, with numerous cases cited.

The reason why the judgment without execution is sufficient is stated on the same page. "The foundation of the action is the judgment obtained against the executor, which, as there has been already occasion to show, is conclusive upon him to show that he has assets." 2 Williams, 1224.

Hence, whenever the executor is sued at common law, he must, at his peril, plead *plene administravit;* if he fail to do so his silence is a confession of assets, and he is not permitted ever after to deny that he has sufficient assets to pay the demand. 3 Term Rep. 690; 3 Bac. Abr., tit. *Executors* (M.); Siglar *v.* Haywood, 8 Wheaton, 678.

There is no averment of judgment or execution in the petition. It is true that the plaintiff alleges that her name and debt were placed on a list of debts, and that on opposition it was adjudged "that the estate of Armour owed petitioner the said sum of money." But this is a very different thing from the judgment against an executor at common law. Such a judgment rendered simply is proof of assets; but a mere decree that the estate owed the debt is no judgment whatever against the executor, and no proof of assets on suit for devastavit.

The proceeding to which the petition alludes is peculiar to the laws of Louisiana. No creditor is permitted to bring suit for the debt of the estate, without first presenting his claim to the administrator. If the claim be acknowledged in writing by the administrator, the creditor "may present it to the judge, that it may be ranked amongst the acknowledged debts of the succession." Louisiana Code of Practice, art. 984, 985. If the administrator refuse to acknowledge the claim, then the creditor may bring suit. Art. 986. But the judgment obtained gives no priority, and the creditor can only obtain payment concurrently with the other creditors. Art. 987. And when the administrator has funds to pay, he calls all the creditors together, to receive the amounts due them respectively. Art. 988.

The judge is empowered to direct the sale of property for payment of debts, and when the representative of the estate has funds, he calls the creditors together, by publications notifying them that a dividend has been declared, and a tableau thereof filed in court, in accordance with which the funds will be distributed after approval by the judge. In other words, estates are administered in Louisiana like bankruptcies. The

executor is the assignee, and he makes payments or declares dividends only under the orders of the court.

The acknowledgment of the executor is often made, as in this instance, by filing in court a list or statement of the debts of the succession. This list approved or homologated establishes the debt as against the succession, and entitles the creditor to participate in any future dividends. Such is the judgment of the plaintiff in this suit. How different it is from the judgment necessary at common law to support the action of devastavit, is too obvious to require any argument. It is different in its effects and its legal consequences. No execution can issue upon it, and it does not imply assets in the hands of the executor. Such a judgment is therefore insufficient to support the action.

If it be pretended that the mode of proceeding in Louisiana precludes any other form of judgment, we reply that such is not the case. The rights of creditors are fully protected under our laws. If he has reason to believe that there are funds in the hands of the executor, he may call upon him by rule, and enforce its distribution. He may even demand the exhibition of his bank-books and accounts, to ascertain if he have funds. Act of 1837, Bullard & Curry's Digest; Kenner *v.* Duncan's Executors, 3 Mart. N. S. 563.

Such a distribution of funds in hand is a judgment in favor of each creditor for the dividend awarded to him. Morgan et al. *v.* Their Creditors, 4 La. R. 174; Nolte et al. *v.* Their Creditors, 7 Mart. N. S. 644; Preston *v.* Christin, 4 La. Ann. Rep. 102.

It is, moreover, a judgment of assets to the amount of the dividend, and if after such a judgment the executor fail to pay, execution issues against him *de bonis propriis*. Code of Practice, Art. 994 and 1057.

It is thus obvious that the laws of Louisiana do afford the same remedies as the common law against estates. If the petition contained an averment that a tableau of distribution had been filed and homologated, confessing the possession of assets, and awarding full payment to the plaintiff, then she would be in precisely the same position with a creditor having a common law judgment against an executor, and could maintain her action of devastavit. The petition contains no such allegation.

The reason of the rule applies to both systems equally. Under neither can the executor be vexed by personal pursuit, until it has been established judicially that payment cannot be obtained *de bonis testatoris*. Until that be ascertained, no personal action lies against the executor. All the cases cited in

the printed brief of plaintiff's counsel support this view of the laws of Louisiana. The creditors and heirs may sue for an account, but no case can be cited in which such an action as the present has been sustained in this State, without showing a necessity for it, by proving that payment cannot be had from the goods of the succession.

The position assumed in plaintiff's brief, that the executor is responsible to creditors for the property that comes into his hands, and for his fidelity in administration, is fully admitted, but it is denied that the courts of Louisiana will entertain a suit in the nature of a devastavit, without showing that the assets of the estate have been in some form exhausted. If the allegations of the petition be true, it is obvious that this suit is both unnecessary and vexatious. If property to the amount of over $ 70,000 in value has come to the hands of the defendant to pay debts of only $ 40,000, it is apparent that she is liable for the assets as executrix. She may be forced, under the heavy penalties imposed by law, on a breach of trust, to sell the property, collect the debts, and distribute the proceeds in the form prescribed by law. The plaintiff does not pretend that she has attempted to procure payment in that form. She alleges no rule against the defendant, no tableau of distribution confessing assets, — no step whatever against her in her representative capacity, taken ineffectually. It is idle to say that the executrix retains and appropriates to her own use the property and funds of the estate. If such property and funds be in her hands, she can hold them only under the control and supervision of the court. She is compelled by law and by the duties of her office to administer and distribute, and no proof can be received that she has not done so, except a judgment of the proper court. Such a judgment any creditor aggrieved may always provoke. The petition alleges no such judgment; the suit is therefore merely vexatious, and deserves no favor.

The point is expressly decided in a case in the Louisiana Reports, and we quote the opinion at length, to show that the principles above stated are fully recognized in Louisiana.

"The plaintiff is appellant from a decree setting aside an order of sequestration which he had previously obtained. This order had been issued on his allegation that Tarbe and Nash had made a surrender of their property to their creditors, in the year 1837; that John Tarbe, one of the insolvents, had been appointed syndic of their creditors, and by the latter dispensed with giving security as such; that the defendant had illegally disposed of part of the property surrendered, by selling it at private sale, and that he was about to dispose of a quantity of other property belonging to the estate in the same illegal man-

ner, to the prejudice of plaintiff and that of all the other creditors. We think that the court below did not err. The whole proceeding appears to us irregular and unwarranted by law. When a syndic has been legally appointed, and has taken charge of the estate intrusted to him, no individual creditor can sue him for a debt, or interfere with his administration. He may be ruled to produce his bank-book, file a tableau of distribution, and pay privileged debts, &c., but he should not be suffered to be harassed by suits brought by individual creditors, who allege or fear mismanagement on his part. If he has been guilty of malfeasance or gross negligence, he can, in due course of law, be removed from office by the creditors, and made liable in damages in his individual capacity. 6 Martin, N. S. 126; Laws of 1837, p. 96." — Lallande *v.* Tarbe, Syndic, 15 La. Rep. 442.

This decision was made with reference to a syndic of insolvents; but the mode of administration, and the rules applicable to it, are precisely the same in estates or successions.

It is thus established that the petition shows no sufficient ground for an action of devastavit, either according to the laws of Louisiana or the common law.

If it were admitted that such a judgment as is required at common law could not be obtained in the State courts, this plaintiff could not be excused from obtaining it on that account. She is a citizen of another State, and the federal courts are open to her. She might there have obtained judgment and issued execution against the executrix, and the return of the writ would have justified the present action. But she seeks to avoid compliance with the requisites of the law, and prefers to prosecute her suit without ascertaining by judicial proceedings that such a suit is either admissible or necessary. That she has chosen a course so irregular is significant of the want of foundation for her demand.

Mr. Justice McLEAN delivered the opinion of the court.

A writ of error to the Circuit Court of the United States for the District of Louisiana brings before us this case.

A suit was commenced by the plaintiff in the Circuit Court against the defendant, on a claim of debt amounting to the sum of $7,510, with interest, which James Armour, husband of the defendant, in his lifetime owed to the plaintiff. He died, having executed a will and made the defendant his executrix. She filed her petition in the Probate Court at New Orleans, and was duly authorized to act as executrix. At the decease of her husband, it is alleged, a large amount of property came into her hands as executrix, which she used for her own bene-

fit, and neglected to pay the debts of the estate. And it averred that a misapplication of the funds has made the defendant liable in her individual capacity, and the plaintiff prays that she may be condemned to pay the above sum, &c.

The defendant demurs to the petition, on the ground that it is not sufficient in law to charge her, for want of parties, and that the matters are only cognizable in chancery. And she answers that she has fully administered, having made a full inventory of the property of said succession, and used all proper diligence to collect the debts, and disposed of the property in obedience to the order of the court; made reports of her acts, and presented a formal tableau of distribution, which was duly approved and homologated by the Probate Court. That the estate proved to be insolvent, and that the defendant is a creditor, recognized as such by the proper tribunal, and is entitled to a preference, &c.

At the trial the suit was dismissed, at the plaintiff's costs.

This was a procedure at law under the forms adopted by Louisiana, and the question is, whether it is maintainable. The plaintiff demands a judgment *de bonis propriis*, against the defendant, no other step having been taken, or notice given, before the commencement of the present action. At common law an executor or administrator is not chargeable on a devastavit, until a judgment shall be obtained against him. He is bound to defend himself by legal pleading, and can have no relief in equity. If he suffer judgment by default, it is an admission of assets, and also if he file a plea in bar which he knows to be false. So if he pleads only the general issue, and has a verdict against him. If he plead *plene administravit*, and on this plea assets are found to be in his hands, he is liable only to the amount of such assets. 3 Bac. Abr., *Executors*, (M).

Estates by the law of Louisiana are administered under the special orders of the Probate Court. By the Code of Practice, Art. 984–988, no creditor is permitted to bring suit without first presenting his claim to the administrator. If the claim be admitted by the administrator in writing, it is filed among the acknowledged debts of the succession. If the claim be rejected, the creditor may bring suit. But a judgment gives no priority.

By articles 1167, 1168, and 1169 of the Civil Code, the curator of a vacant succession can pay no debts, except privileged ones, until three months after the succession is opened, and then under the order of the judge. When the time for payment arrives, he must present his petition to the judge, with a statement of the debts due. And if the funds in his hands

shall be insufficient to pay the debts in full, he is required to make a tableau of the distribution and present it to the judge, with a prayer that he should be authorized to make the payments accordingly. But if the administrator or curator "neglect or refuse to file a tableau of the estate, and obtain the order of the judge to make payment, he can be compelled to do so on the demand of the interested, or in default thereof render himself responsible in his personal capacity." Kennet et al. v. Duncan's Executors, 3 Martin, N. S. 570.

This last procedure is as indispensable under the Louisiana law to authorize a proceeding against the executor or administrator to make him personally responsible, as an action and judgment are necessary at common law to charge him with a devastavit. And it does not appear from the petition in the case before us, that any order of the judge was obtained as required, or that any proceedings were had to compel the defendant to exhibit a tableau of distribution, by which it would appear whether the executrix had assets in her hands to pay the whole or any part of the debt of the plaintiff. This action was commenced at law, and the fact is alleged that a large amount of assets came into the possession of the defendant which have been misapplied, on which ground a personal liability is sought to be enforced against her. This the law does not authorize. An executor or administrator by the laws of Louisiana is considered, in this respect, as a syndic of an insolvent estate. In 6 Martin, N. S. 126, the court say, when a syndic has been legally appointed, and has taken charge of the estate intrusted to him, no individual creditor can sue him for a debt or interfere with his administration. He may be ruled to produce his bank-book, file a tableau of distribution, &c., but he should not be suffered to be harassed by suits brought by individual creditors, who allege or fear mismanagement on his part.

The judgment of the Circuit Court is affirmed, with costs.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this case be, and the same is hereby, affirmed, with costs.

THE UNITED STATES, PLAINTIFFS IN ERROR, v. THOMAS GIBBES MORGAN, THOMAS W. CHINN, MICAJAH COURTNEY, JOSIAH BARKER, AND THE HEIRS AND LEGAL REPRESENTATIVES OF JOHN DAVENPORT, DECEASED.

Although a bill of exceptions is imperfectly drawn, yet if this court can ascertain the substance of the facts, and the questions on which the judge instructed the jury are apparent, it will proceed to decide the case.

Where a collector received treasury-notes in payment for duties, which were cancelled by him, but afterwards stolen or lost, altered, and then received by him again in payment for other duties, he is responsible to the government for the amount thereof.

So also he is responsible, to a certain extent, where treasury-notes were received by him in payment for duties, cancelled, but lost or purloined (without his knowledge or consent) before being placed in the post-office to be returned to the Department.

And this is so whether the notes be considered as money or only evidences of debt by the Treasury Department.

But the extent, above mentioned, to which his responsibility goes is to be measured by a jury, who are to form their judgment from the danger of the notes getting into circulation again, the delay and inconvenience in obtaining the proper vouchers to settle accounts,-the want of evidence at the Department that the notes had been redeemed, or from any other direct consequence of the breach of the collector's bond.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Louisiana.

It was a suit brought upon a collector's bond against Thomas Gibbes Morgan, the principal, and Thomas W. Chinn, Micajah Courtney, Josiah Barker, and John Davenport, sureties. The bond was executed on the 14th of December, 1841, and recited that Morgan had been appointed collector of the customs for the district of Mississippi, in the State of Louisiana, on the 25th of June, 1841. It was in the usual form, with a condition that Morgan "has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge, all the duties of the said office." The penalty was $120,000.

The suit was brought on the 15th of December, 1843, and the breach is thus set out in the petition:—

"Now these petitioners, by their attorney aforesaid, aver and expressly charge that the condition of said bond or writing obligatory has been broken in this, to wit, that the said Thomas Gibbes Morgan had not truly and faithfully executed and discharged, nor did said Thomas Gibbes Morgan continue truly and faithfully to execute and discharge, all the duties of the said office according to law. That the said Thomas Gibbes Morgan did, both before and after the time of the signing of said bond, and while he was collector as aforesaid, receive as said collector large sums of money belonging to petitioners, which he has in part only paid to petitioners, leaving the

balance of $274,775.17, which was received by said Morgan as said collector, and while he was said collector, and which said balance said Morgan has refused to pay to petitioners, and yet retains the same in his possession, though often directed and requested by petitioners to pay the same to them. That said Morgan has not, since the first quarter of the year 1843, transmitted the returns of his accounts as said collector for settlement to the proper officer, as he is required by law to do, and for that reason petitioners are unable to specify the items of said balance, but they reserve the right, by amended petition or otherwise, of furnishing a detailed statement of said Morgan's account as said collector so soon as he shall transmit his quarterly returns as aforesaid; by means whereof a right of action has accrued to these petitioners to have and recover the penalty of said bond or writing obligatory, which, though amicably requested, said obligors refuse to pay.

"That said petitioners also reserve the right of proceeding, by amended petition or otherwise, against the said Thomas Gibbes Morgan for any other or greater sum than the penalty of said bond herein sued for, even should the same exceed the said balance of $274,775.17, inasmuch as, from the omission and neglect of said Morgan to furnish said quarterly returns, petitioners are unable to finally adjust the accounts of said Morgan as said collector."

The defendants answered with a general denial, as in a plea of *nil debet*.

On the 27th of January, 1848, the cause came on for trial in the Circuit Court, and continued during that day, the 28th, and the 29th. The record stated the impanelling of the jury, the opening of the case by the district attorney, the fact that evidence was given on the part of the plaintiffs and on the part of the defendants, and the following verdict of the jury: —

"Verdict in favor of the United States, viz.:

For the balance acknowledged, ...	$32,400.13
And commissions, ...	28,169.44
Amounting to	$60,569.57

"JOHN CASTELLANO, *Foreman.*

"*New Orleans, January 29th,* 1848."

The verdict was recorded and judgment entered up on the 9th of February, 1848. But the record did not show, in any part of it, what the evidence was which was given either on the part of the plaintiffs or defendants. The following bills of exception refer to, but do not state it.

"And afterwards, to wit, on the 4th day of February, 1848, the following bill of exceptions was filed by the United States district attorney:—

"THE UNITED STATES *v.* THOMAS GIBBES MORGAN and others. In the United States Circuit Court in and for the Fifth Circuit and District of Louisiana.

"Be it remembered, that, at the December term of said court, on the trial of the above-named case, on this Saturday, the 29th day of January, in the year 1848, after the argument on both sides had been closed, and before the jury had retired, the attorney of the United States for the district aforesaid prayed the court to charge the jury as follows, to wit:—

"First. That T. G. Morgan, and the sureties on his official bond, were liable in law for the sum of $99,915.27, an amount of treasury-notes received by T. G. Morgan, collector, in payment of public dues, and lost by him, or stolen from him while in his possession, after they had been marked 'cancelled,' and before they were deposited in the post-office; for which purpose they had been put up in a bundle.

"And, on the day and date aforesaid, the attorney of the United States aforesaid further prayed the court to charge the jury,—

"Second. That the defendant, T. G. Morgan, and the sureties on his official bond, were liable in law for the sum of $1,074.89, being the amount of two treasury-notes of five hundred dollars each, and the interest thereon; which notes were received in payment of public dues by T. G. Morgan, collector, stolen from his office, altered, and afterwards again received by him.

"The court refused to give the above charges as required, but charged the jury that, if they believed, from the evidence before them, that the treasury-notes in controversy were received by the defendant in payment of revenue, and that he took receipt upon the back of them when received from the persons paying them in, and cancelled them on the face of each according to law, and had them put into a bundle in the usual manner for transmitting them to the Treasury Department, and gave orders to the person who had been in the habit of delivering them at the post-office to deposit them there for transmission; and they were lost or purloined without the knowledge or consent of defendant, he is not answerable to the plaintiff for them. And the court further charged the jury, that if they believed from the evidence that the two treasury-notes, amounting to $1,074.89, were part of the treasury-notes so cancelled, and intended to have been forwarded to the Treasury Department, but had been subsequently so altered

without the knowledge or consent of the defendant, so as to make them appear to be genuine, and he afterwards received them in payment of duties believing them to be genuine, he is not responsible to the plaintiff for them, but is entitled to a credit on the account of the plaintiff for that amount.

"Wherefore, the attorney of the United States aforesaid tenders this his bill of exceptions to the said refusal, and prays the same may be made a part of the record.

"THEO. H. MCCALEB, [L. S.]
U. S. Judge.

"And afterwards, to wit, on the 5th day of February, 1848 the following bill of exceptions, taken by the counsel of the defendants, was filed: —

"THE UNITED STATES *v.* THOMAS GIBBES MORGAN and others.

In the United States Circuit Court, in and for the Fifth Circuit and District of Louisiana.

"Be it remembered, that, at the December term of said court, on the trial of the above-named case, on this Saturday, the 29th day of January, in the year 1848, after the defendants had introduced evidence to show that the item charged by the said T. G. Morgan in his account for the second quarter of the year 1842, for safe-keeping and disbursement of public moneys from 12th July, 1842, to 26th July, 1843, being commission thereon, amounting to the sum of $28,169.44, was reasonable and just under the circumstances, and which said item had been disallowed by the accounting officer of the Treasury Department; and after the argument on both sides had been closed, and before the jury had retired, the counsel for the defendants aforesaid requested and prayed the court to charge the jury as follows: —

"That the defendant, T. G. Morgan, when acting as collector of the customs, not being under the law a disbursing officer, and the payment of the drafts drawn on him by the Treasurer of the United States not being in the course of his duties as collector, he is entitled to a reasonable compensation for his risk and trouble in keeping and disbursing the money.

"The court refused to give the above charge as required, but charged the jury that, under the law, the defendants were not entitled to the credit and compensation by them claimed as aforesaid.

"Wherefore the defendants, by their counsel, tender this their bill of exceptions to the said refusal, and pray that the same may be made a part of the record.

"THEO. H. MCCALEB, [L. S.]
U. S. Judge."

The attorney for the United States sued out a writ of error, and brought the case up to this court.

It was argued by *Mr. Crittenden* (Attorney-General), for the plaintiffs in error, no counsel appearing for the defendants.

Mr. Crittenden contended that the court erred to the prejudice of the United States in the instructions given, and also in refusing to give those requested on their part, and that the defence allowed by the court below did not discharge, and ought not to discharge, the collector and his sureties in this action on his official bond, and referred to United States *v.* Prescott, 3 Howard, 578.

Mr. Justice WOODBURY delivered the opinion of the court.

This was an action on an official bond, given to secure the faithful performance of duty by one of the defendants, as collector of the port of New Orleans.

His appointment took place in June, 1841, and the bond was dated in December of the same year, and the condition was averred to have been broken in 1843 by not paying over large sums of money collected for the United States, and by not making seasonable returns of his accounts.

The breaches were denied, and at the trial it would seem that evidence was given in relation to them, and the jury returned a verdict for the plaintiffs for $ 60,569.57.

But something like $ 100,000 more appear to have been claimed, which the jury, under the instructions given by the court, disallowed, and exceptions were thereupon filed to these instructions.

The object and character of the exceptions are intelligible by means of what is stated by the judge in connection with them, though no preliminary evidence is set out, on which the points of law arose.

This mode of drawing up a bill of exceptions is defective, as the material facts or proofs on which the instructions rest should be inserted before the instructions, in order that we may see if the points arise on which they are given, and to which exception is taken. Zeller's Lessee *v.* Eckert et al., 4 Howard, 297, 298; Vasse *v.* Smith, 6 Cranch, 233, 234; 3 Howard, 555, 556.

The treasury transcript in support of the suit, and the precise breach, and the instructions or circulars from the Department as to the mode of cancelling and transmitting the notes in the present case, should appear, so far as material, as well as the evidence how they were in fact cancelled, and what has probably become of them since.

But considering that we can, by way of inference from the instructions in the form in which they were given, ascertain the substance of the facts, and save delay in sending the case back for a fuller and more technical bill before deciding the points of law presented, we have concluded to state our opinion now on those points.

And neither party can complain of this, when, as here, neither has objected to the imperfect form of this bill, and when the questions on which the judge instructed the jury are apparent, and are not pretended to have been abstruse or irrelevant, but related to the gist of the matter in controversy. Etting *v.* Bank of the United States, 11 Wheaton, 59.

The material facts, from what is developed in the charge, seem to have been, that the collector received near $100,000 for duties in treasury-notes, and cancelled them; but after being put up in a bundle to be sent to the Treasury Department, through the post-office, and orders given to the servant accustomed to deliver packages there to deliver these, the bundle was stolen or lost.

It appeared further, that two of these notes for $500 each were soon after altered and presented to the collector in payment of other duties, and received by him as genuine.

One of the instructions excepted to was, that if these last two notes were taken by the collector without his knowledge or consent to their alteration, and if they appeared to be genuine, and he believed them to be so, he was not liable for their amount and interest.

But we all agree in opinion that this instruction was erroneous. A collector is bound to take genuine money or notes rather than counterfeit ones, or the government would be exposed to infinite frauds and losses. The collector, too, need not thus suffer in a case like this, as he is required to keep a register of all treasury-notes received, and from whom taken; and if any prove to be counterfeit, or altered, he has a remedy in his own name, or that of the government, for the amount on the person who paid them in.

It is well settled, likewise, that an attempted payment in counterfeit money, as cash, is in law no payment. Ellis *v.* Wild, 6 Mass. 321; Young *v.* Adams, Ibid. 182, 186; Jones et al. *v.* Ryder et al., 5 Taunton, 488; Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 27, 28; 2 Johns. 455; 6 D. & E. 52. And as the collector here has given a discharge for the duties to the amount of these notes, and has acknowledged the receipt of payment for the duties to the government, as well as the importer, and received or paid over nothing for them which he was authorized to receive, he must stand chargeable for that amount.

He was no more justified in taking cancelled treasury-notes for duties than in taking waste-paper, and it was his particular duty to see that they had not been cancelled or counterfeited; and in the schedule of the treasury-notes, which he was obliged to keep, he had ample means of detection. Though the government might still possess a remedy against the importer for the duties, there having yet been no valid payment by him, yet this is no bar, if they choose to resort to their remedy on the bond of the collector, for his official negligence and wrong in taking for their revenue counterfeit or cancelled notes.

The other instruction presents a question of more difficulty. It was, that the collector was not liable for the treasury-notes which he had received for duties, if they had been duly cancelled, after received, and were put up and ordered to be delivered at the post-office for transmission to the Treasury Department, though they were lost or purloined (without his knowledge or consent) before placed in the charge of the post-office.

A majority of us think that this instruction also was erroneous. It is manifest that, if the notes, though cancelled for security in keeping them till transmitted, were still to be regarded for any purpose as money, the collector must be considered as liable for their amount till paid to the Department, or actually delivered at the post-office, in conformity with the orders of the Department. It would then be a liability on his bond to pay over what money he had received, as that manifestly had not here been done; or it would be a liability to perform his duty as promised in his oath and bond, and as required by law and treasury instructions, — to transmit or pay over the notes, and which, considering them as money, it cannot be pretended he has done. On this it is enough, in support of his continued responsibility, to refer to the United States *v.* Prescott, 3 Howard, 578.

But were these notes, when lost, still money?

It is true that originally they were by law to be received as money. (Act of 12th October, 1837, 5 Stat. at Large, 202, § 6.) The fact that he is liable for the interest on these notes after received and cancelled, and until they reach the Department, appears to favor the idea that the notes were still, for some purposes at least, to be treated as continuing money between the collector and the Department. (5 Stat. at Large, 203, § 7.)

But if this view be not clearly sustainable, and we doubt whether, under all the circumstances, after cancelled, they can be regarded as money, or money's worth, for the purpose of sustaining this action, yet it is clear that they still possess some

value as vouchers, and as evidence for the Treasury Department that they have been redeemed.

It is still clear, also, that, though cancelled, the Treasury Department, unless having possession of them, is exposed to expense and loss by their being altered, and the cancellation removed or extracted, and their getting again into circulation, as two did here, and being twice paid by the government.

For that reason, these notes, though cancelled, are, by law and treasury orders, to be transmitted to the Department, and when received there are to be credited to the collector; but not till then, as a general rule. If the collector, therefore, fails to send them there or to do all which is proper to get them there, by having them put into the actual possession of some public transmitting agent like the post-office, he fails in his duty; and it is not enough for him to say, in justification, as in this case, and as the court below upheld, that he gave orders to the accustomed servant to put them in the post-office.

That servant was his own agent, and not the agent of the Treasury Department. He allowed the notes to be lost or stolen before reaching the post-office. His employer must suffer by his neglect or unfaithfulness rather than third persons. The condition of the bond of the collector has, therefore, in this view, never been fulfilled, and *primâ facie* he is technically liable for its penalty, and is in justice, as well as law, responsible for the amount of the injury thus caused by himself or his own agent.

The rule of damage would be the amount of the notes, — unless it appeared, as here, that they had been cancelled, and unless it was shown that the government had suffered, or was likely to suffer, damage less than their amount. How much is the real damage, under all the circumstances, is a question of fact for the jury, and should be passed on by them at another trial.

Only that amount rather than the whole bond need, in a liberal view of the law, and of his bond, be exacted; and that amount neither he nor his sureties can reasonably object to paying, when he, by the neglect of himself or his agent, has caused all the injury which he is in the end required to reimburse. And if any equities exist to relieve him from that, none of which are seen by us, it must be done by Congress and not the courts of law.

Any thing less than this, — any less strict rule, in the public administration of the finances, would leave every thing loose or unsettled, and cause infinite embarrassments in the accounting offices, and numerous losses to the government.

The argument which has been pressed to exonerate him

even from this extent of liability rests on an erroneous impression that he was acting as a bailee, and under the responsibilities of only the ordinary diligence of a depositary as to the cancelled notes, when in truth he was acting under his commission and duties by law, as collector, and under the conditions of his bond. The collector is no more to be treated as a bailee in this case than he would be if the notes were still considered for all purposes as money.

He did not receive them as a bailee, but as a collecting officer. He is liable for them on his bond, and not on any original bailment or lending.

And if the case can be likened to any species of bailment in forwarding them, by which they were lost, it is that of a common carrier to transmit them to the treasury, and in doing which he is not exonerated by ordinary diligence, but must answer for losses by larceny and even robbery. 2 Salk. 919; 8 Johns. 213; Angel on Carriers, §§ 1, 9.

Finally, we decide on this last question as a matter of law this, and this only, namely, that the collector is liable for all the actual damages sustained by his not returning the notes as required by law and official circulars; or for not putting them in the post-office so as to be returned. (5 Stat. at Large, 203.) But how much this damage was is a matter of proof before the jury, fixing the real amount likely to happen from their getting into circulation again, as two of them did here, from delay and inconvenience in obtaining the proper vouchers to settle accounts, from the want of evidence at the Department that the notes had been redeemed, or from any other direct consequence of the breach of the condition of his bond, and of his instructions under it.

Their return in the mode prescribed was by the original treasury-note law deemed important "to promote the public interests and convenience, and secure the United States and the holders of said notes against fraud and losses." (Sec. 12th of the act of 1837, before cited.) The neglect to do this is a manifest and injurious breach of his bond.

The judgment below, then, must, for both of these instructions excepted to, be reversed, and the case sent back for another trial, in conformity with the principles we have laid down.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be,

and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

ERICH CHRISTIAN LUDWIG GRUNER, CLAIMANT OF THE SCHOONER FAIRY, HER TACKLE, &c., APPELLANT, *v.* THE UNITED STATES.

Where a vessel was libelled in the District Court and sold by agreement of parties, and the proceeds of sale amounted only to $ 850, which was paid into the registry, this is insufficient to bring the case within the jurisdiction of this court, although an agreement by counsel was filed admitting the value of the vessel to be more than two thousand dollars.

This agreement would be evidence of the value if nothing to the contrary appeared in the record. But the decision of the court would only determine the right to the proceeds of sale, viz. $ 850, and the case must therefore be dismissed, for want of jurisdiction.

THIS was an appeal from the District Court of the United States for the District of Texas.

The facts in the case are sufficiently stated in the opinion of the court.

It was argued by *Mr. Sherwood*, for the appellant, and *Mr. Crittenden* (Attorney-General), for the appellees.

Mr. Chief Justice TANEY delivered the opinion of the court.

The schooner Fairy was seized by the collector of the port of Galveston for a violation of the registry acts of the United States, and libelled in the District Court for the District of Texas.

A few days before she was seized by the collector, she had been seized by the sheriff of Galveston County upon process of sequestration issuing from a State court at the instance of Gruner, the appellant. He appeared in the admiralty court, and denied that the vessel was liable to forfeiture under the registry acts; and averred that he had an equitable lien upon her to the full amount of her value, by reason of certain transactions with a man by the name of Fruh, which are set out at large in his answer; that he had proceeded to enforce this lien in the proper court of the State of Texas, and had obtained process of sequestration against the Fairy, which had been duly served, and that she was in the custody of the sheriff of Galveston County upon this process when she was seized by the collector; and he denied that the District Court had jurisdiction to proceed against her when she was previously in custody of the law upon process from the State court.

While the suit was pending in the District Court, a written agreement was filed between the district attorney and the

proctor for the claimant, by which it was stipulated, that, upon the attorney for the United States procuring an order from the District Court for the sale of the vessel, and upon a similar order being obtained from the State court, the vessel should be sold, and the proceeds paid into the registry of the District Court of the United States, to abide the ultimate decision of the suits in the two courts; the rights of neither party to be prejudiced by the sale. The sale was accordingly ordered; and the schooner was sold by the marshal for $850, and the proceeds paid into the registry. And upon the final hearing of the case the court condemned the Fairy as forfeited to the United States, and disallowed the claim of Gruner under the sequestration from the State court.

There is an agreement in the record signed by the attorneys of the parties, admitting that the schooner was worth over two thousand dollars.

This brief statement will show how the question of jurisdiction arises in this court. And as we think the case must be disposed of upon that question, it is unnecesary to state more particularly the facts, or the points of law which arose on the trial, and which are fully discussed in the printed arguments filed in the case.

The vessel has been sold by the consent of the parties, and the proceeds of sale paid into the registry. This sum of money is the only matter in controversy in this court; and if the decree of the District Court is affirmed or reversed, the decision would do nothing more than determine the right to this money; and the sum paid into the registry is far below the amount necessary to give jurisdiction to this court.

It is true that there is an admission by the parties, as we have already stated, that the vessel was worth more than two thousand dollars. And this admission would be evidence of the value where nothing to the contrary appeared in the record. But the consent or agreement of parties cannot give jurisdiction to this court. Its appellate power is regulated and limited by law. And as it appears on the face of the record that the sum in controversy is below two thousand dollars, the appeal must be dismissed for want of jurisdiction.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Texas, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that this cause be, and the sam is hereby, dismissed, for want of jurisdiction.

JAMES D'ARCY, PLAINTIFF IN ERROR, v. MORRIS KETCHUM, THOMAS ROGERS, AND EDWARD BEMENT, COPARTNERS, TRADING UNDER THE NAME AND FIRM OF KETCHUM, ROGERS, AND BEMENT.

A statute of the State of New York provides, that, where joint debtors are sued and one is brought into court on process, if judgment shall pass for plaintiff, he shall have judgment and execution not only against the party brought into court, but also against other joint debtors named in the original process, in the same manner as if they had all been taken and brought into court by virtue of such process; but it shall not be lawful to issue or execute any such execution against the body or against the sole property of any person not brought into court.

Where a judgment was given in New York against two partners, one of whom resided in Louisiana and was never served with process, and an action was brought against him in Louisiana upon this judgment, a peremptory exception, in the nature of a demurrer, that "the judgment sued upon is not one upon which suit can be brought against the defendant in this court," was well founded.

Congress did not intend, by the act of 1790, to declare that a judgment rendered in one State against the person of a citizen of another, who had not been served with process or voluntarily made defence, should have such faith and credit in every other State as it had in the courts of the State in which it was rendered.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Louisiana.

Mr. Justice McKinley did not sit on the trial of this cause in the Circuit Court.

In February, 1849, there were two commercial houses, one trading under the name of A. H. Gossip & Co. in New York, and the other under the name of Gossip & Co. in New Orleans. The firm of A. H. Gossip & Co. consisted of Aurungzebe H. Gossip and Joseph Calder, and the firm in New Orleans consisted of George H. Gossip and James D'Arcy.

On the 4th of February, 1849, the New York house drew the following bill of exchange upon the New Orleans house, viz.: —

"$1,461$\frac{87}{100}$. *New York, 4th February*, 1839.

"Four months after date, pay to our own order fourteen hundred and sixty-one $\frac{87}{100}$ dollars, value received, and charge the same to account of

(Signed,) A. H. GOSSIP & Co.
157 *Water St., New York.*"

"To Messrs. GOSSIP & Co.,
St. Charles St., New Orleans. (Accepted.)

"Accepted:

"GOSSIP & Co."

Indorsed:

"A. H. GOSSIP & Co.
J. STEWART, 5 *Platt St.*"

This bill appeared to have passed into the hands of Ketchum, Rogers, and Bement, and not to have been paid at maturity.

In February, 1840, Ketchum, Rogers, and Bement brought an action in the Superior Court of the City of New York against the drawers and acceptors of the bill, viz: Aurungzebe H. Gossip, Joseph Calder, George H. Gossip, and James D'Arcy. The suit was brought against them jointly, and the declaration contained the money counts, together with a notice that the bill of exchange would be given in evidence under these counts.

The record did not show that any process was served upon either of the four defendants. George H. Gossip, a partner in the New Orleans house, voluntarily appeared. The record contained a suggestion that neither the declaration nor any notice of the rule to plead thereto had been served on the defendants Aurungzebe H. Gossip, Joseph Calder, or James D'Arcy. George H. Gossip pleaded the general issue, and gave notice of a set-off.

In December, 1846, the cause was called for trial, but George H. Gossip made default. A jury was impanelled to assess the damages, who gave the following verdict, viz.:—

"That the said George H. Gossip did undertake and promise in manner and form as the said plaintiffs have above thereof complained against him, and they assess the damages of the said plaintiffs, by reason of the non-performance of the said several promises in the said declaration contained, to the sum of $1,418.81, besides their costs and charges by them about their suit in that behalf expended, and for those costs and charges to six cents.

"Therefore it is considered that the said plaintiffs do recover, against the said George H. Gossip and James D'Arcy, their damages aforesaid, by the jury aforesaid, in form aforesaid, and also the sum of $52.06, for their said costs and charges by the said court now here adjudged of increase to the said plaintiffs, and with their assent; which said damages, costs, and charges in the whole amount to $1,470.93; and the said defendants in mercy, &c.

"Judgment signed this 25th day of January, 1847.

"THOMAS J. OAKLEY."

The above judgment was rendered against D'Arcy as well as George H. Gossip, under a statute of the State of New York, which provides that, "where joint debtors are sued and one is brought into court on process, he shall answer the plaintiff; and if judgment shall pass for plaintiff, he shall have judgment and execution, not only against the party brought into court, but also against other joint debtors named in the original

process, in the same manner as if they had all been taken and brought into court by virtue of such process; but it shall not be lawful to issue or execute any such execution against the body or against the sole property of any person not brought into court."

Under this judgment against D'Arcy, Ketchum, Rogers, and Bement brought a suit in the Circuit Court of the United States for the District of Louisiana, of the following description. The suit being by petition, the whole of it will be inserted.

"The petition of Morris Ketchum, Thomas Rogers, and Edward Bement, copartners, doing business under the firm of Ketchum, Rogers, and Bement, humbly shows, that petitioners are citizens of the State of New York, and that James D'Arcy, who is a citizen of the State of Louisiana, is indebted unto petitioners in the sum of $1,418.81, with interest and costs, for this:

"That heretofore, to wit, on or about December, 1846, George H. Gossip and James D'Arcy, being jointly and severally indebted to petitioners in the aforesaid sum, petitioners recovered in the Superior Court of the State of New York a final judgment against said George H. Gossip and James D'Arcy for said sum of $ 1,418.81, with costs; which said judgment was duly and legally obtained, and was and is valid and binding upon said debtors in the State of New York, where the same was rendered as aforesaid. That said Gossip and Company was a commercial firm composed of said G. H. Gossip and said James D'Arcy; and petitioners show, that in virtue of said judgment they are entitled to recover of said D'Arcy the whole sum herein claimed; that he refuses to pay the same, although amicably requested to; all of which more fully appears by reference to the exemplified record of said judgment and proceedings, made part hereof.

"Petitioners therefore pray said James D'Arcy be cited, and that after due proceedings he be condemned to pay petitioners $1,418.81; $ 52.12 costs, interest at the rate of seven per centum per annum, the legal interest of the State of New York, from February 1, 1840, till paid, and for general relief.

"And as in duty," &c.

To this petition there was attached an exemplification of the record, with some few irregularities which it is not worth while to specify.

D'Arcy appeared and filed the following exceptions and answer:—

"The defendant in the above suit, a citizen of the State of Louisiana, residing in New Orleans, now comes and excepts

to plaintiffs' petition filed in said suit, that the same is not addressed to any court of the United States of America, and is therefore informal and should be dismissed.

"2d. The defendant excepts, that the judgment sued upon is not one upon which suit can be brought against the defendant in this court.

"3d. The defendant excepts to said judgment, that it does not follow the verdict; that the same is not signed, and is not final; and that the same, with the record of proceedings in the suit in which the same was rendered, is not properly certified, as required by law; and the said record is upon its face incomplete.

"4th. The defendant pleads prescription.

"If the above exceptions and plea are overruled, the defendant for answer says, that he does not owe the plaintiffs in manner and form as set forth by them; that he is in no way indebted to them; and prays that he may have judgment thereof in his favor, and that said plaintiffs be condemned to pay all costs."

In May, 1848, these exceptions were argued, and the Circuit Court (Mr. Justice McKinley being absent) overruled the exceptions and gave the following judgment: —

"This cause having been argued, and submitted to the court on the 8th instant, and the court having maturely considered the same under the law and the evidence, it is ordered, adjudged, and decreed, that there be final judgment rendered herein in favor of the plaintiffs, Ketchum, Rogers, and Bement, and against the defendant, James D'Arcy, for the sum of $1,418.81, with interest thereon at the rate of seven per centum per annum, from the 1st day of February, 1840, till paid, $52.12 costs of suit in New York, and the costs of this suit to be taxed.

"Judgment rendered May 17, 1848.

"Signed June 17, 1848.

"THEO. H. McCALEB, [SEAL.]
U. S. Judge."

A motion was made for a new trial, but it was overruled.

D'Arcy then sued out a writ of error, and brought the case up to this court.

It was argued by *Mr. Coxe*, for the plaintiff in error, and *Mr. Ketchum*, for the defendants in error.

Mr. Coxe, for the plaintiff in error, made the following points.

The distinction frequently expressed by this court between judgments that are erroneous and subject to reversal on error,

and those which are essentially defective and void, will not be impugned or controverted; but it is submitted that the New York judgment in this case, and which constitutes the sole foundation of the present suit, is so essentially defective, that it cannot give support to this judgment.

1. It is not sufficiently authenticated as the law requires, to entitle it to admission in evidence.

The foundation of the existing law on this subject will be found in the Constitution, Art. IV. § 1, which provides that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

Congress, by the act of May 26, 1790 (1 Statutes at Large, 192, c. 11), did prescribe this mode of authentication, and declare that the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, &c., that the said attestation is in due form. In this case there is no seal of court attached.

In the United States *v.* Auredy, 11 Wheat. 407, this court held that no other or further formality is required than the annexation of the seal; the act of Congress requires no other authentication. That was the case of a legislative proceeding.

In Craig *v.* Brown, 1 Pet. C. C. 352, where the question arose as to the authentication of a judicial proceeding, it was held that, whenever the court whose record is certified has no seal, this fact should appear in the certificate of the clerk or in that of the judge, and where there is a seal, that should be appended. The record in this case shows that the court has a seal, yet none appears on the paper. This, the proper and only legal authentication of a judicial record, is omitted.

2. The judgment does not appear to have been signed by a judge of the Superior Court. In his attestation the chief justice calls himself by his appropriate title, but the judgment itself is signed Thomas J. Oakley, without any designation of office.

3. From the record it is apparent, not only that D'Arcy never was served with process, or in any manner notified of the proceeding, but it fully appears that there was no attempt to serve him with process, for none was ever issued; none to serve him with a copy of the declaration, for the reason assigned, his absence from the jurisdiction of the court; no proceeding against him by public notification or otherwise, to inform him

of the pendency of the suit; no averment of any default warranting a judgment in his absence.

In Mayhew *v.* Thatcher, 6 Wheat. 129, this court held that the record of a judgment in a State court is conclusive, although it appears the suit was commenced by attachment, when the defendant appeared and made defence.

In Hollingsworth *v.* Barbour, 4 Peters, 466, this court cited 5 Johns. 37, 41; 3 Wils. 297; 9 East, 192; 8 Johns. 86, 90; and affirmed the law as declared by Judge Trimble on the circuit, that, "by the general law of the land, no court is authorized to render a judgment or decree against any one, or his estate, until after due notice by service of process to appear and defend. This principle is dictated by natural justice, and is only to be departed from in cases expressly warranted by law and excepted out of the general rule." See also p. 475.

The objections here urged were distinctly presented to the Circuit Court and overruled.

The proceedings in the Circuit Court are scarcely less irregular and extraordinary.

1. The petition is addressed to the court by a name unknown to the law.

2. The suit is instituted against D'Arcy alone, upon a joint judgment against two, without assigning any reason for omitting the only party who had appeared in the New York court, and who alone appears to be party to the proceedings and verdict in that court.

3. In setting out that judgment, the petitioners have miscalled the court in which it is said to have been rendered. It is called the Superior Court of the State of New York. In declarations it is essential that the plaintiff should set out the ground of his action with the most rigid particularity. In suits upon judgments this is especially required. Any variance is fatal. In Coy *v.* Hymas, 2 Str. 1171, plaintiff declared upon a judgment for £ 388 0*s.* 1*d.* as a judgment for £ 388, and the variance was held fatal. In Pope *v.* Foster, 4 T. R. 590, which was an action for a malicious prosecution, it was held that an averment in the declaration of the day of trial must exactly agree with the record to be produced to support it. On account of a variance as to the day, Lord Kenyon nonsuited plaintiff, and the court refused a rule to set aside the nonsuit. In Green *v.* Bennett, 1 T. R. 656, an action against defendant for negligence as attorney, the return of the writ as laid in the declaration varied from that in the record, and it was held fatal. In Purcell *v.* Macnamara, 9 East, 160, the case of Pope *v.* Foster was overruled, on the single ground that the day constituted no part of the description of the judg-

ment; had it been so laid, the variance would have been fatal. The case of Green *v.* Bennett is, however, approved.

4. The judgment in the Circuit Court does not correspond with the New York judgment, on which suit is brought. The petition prays that defendant be condemned to pay $ 1,418.81, $ 52.12 costs, with interest at the rate of seven per cent., the legal interest of New York, from February 1, 1840, till paid. The New York judgment is for $ 1,470.93, including costs, without any express allowance of interest, and consequently not bearing interest anterior to the date of the judgment, viz. 25th January, 1847. The judgment of the Circuit Court is for $ 1,418.81, with interest at seven per cent. from the 1st of February, 1840, beside the costs of both suits, thus allowing interest, according to the New York rate, for about seven years before any was due under the New York judgment.

Even if interest could be allowed from a date anterior to the judgment, which, under the verdict in New York, clearly could not be done, yet if that suit was in fact brought on the bill of exchange, as it purports to be, that, being payable in New Orleans, could only bear Louisiana interest, and that from the date of the judgment, which must be presumed to have comprehended all the interest then due.

In violation of these principles the judgment of the Circuit Court was rendered, and on these grounds should be reversed.

5. Again, the petition sets forth that the petitioners, on or about December, 1846, recovered this judgment; whereas, the proof is that the judgment was signed in January, 1847; and even the hour and minute are set forth, 10.25 A. M.

Mr. Ketchum, for the defendants in error, made the following points.

I. The judgment in the Superior Court was properly entered against James D'Arcy, according to the law of the State of New York, and that judgment merged the demand on the promissory note, to recover which the suit below was brought. Carman *v.* Townsend, 6 Wend. 206; Opinion of Chancellor, Ibid. 209; Oakley *v.* Aspinwall, 2 Sandford's Superior Court Rep. 8.

II. The petition not only sets forth the judgment, but avers that the same "was and is valid and binding upon said debtors in the State of New York, where the same was rendered as aforesaid," and also, "that said Gossip and Company was a commercial firm, composed of said G. H. Gossip and said James D'Arcy." Defendant below takes three exceptions to the petition. He does not deny in these exceptions "that the

judgment was valid and binding upon said debtors in the State of New York," nor does he deny "that said Gossip and Company was a commercial firm," &c. Not having denied these allegations, they are admitted; the admissions, therefore, in point of fact, on the exceptions, are: —

1. That judgment, such as that set forth, was recovered in the Superior Court of the City of New York.

2. That the judgment was valid and binding upon the debtors in the State of New York.

3. That Gossip & Co. was a commercial firm, composed of G. H. Gossip and James D'Arcy.

These, as matters of fact, are admitted by the exceptions; but then it is denied in the exceptions that the judgment is one upon which suit can be brought against the defendant in this court; it is also alleged that the judgment does not follow the verdict, and that the same is not signed, and is not final, and not properly certified.

III. The exceptions were rightly decided against defendant by the court below.

IV. The motion for a new trial on 19th May, 1848, was made upon the ground that the judgment rendered in said suit was contrary to law and evidence, insomuch as by said judgment an effect is given to the record of a judgment rendered and proceedings had in a court of the State of New York, superior to, and wholly different from, the effect which would be given to said judgment and proceedings so rendered and had in one of the courts of the State of New York in any court of the said State of New York.

Had the plaintiff declared on the judgment, substantially, as he has stated his case in the petition, and had the defendant below demurred thereto, on the ground stated in the exceptions, on that demurrer judgment would have been rendered against defendant in the State of New York. Carman *v.* Townsend, 6 Wend. 206.

V. If the cause was heard on the exceptions only, and judgment passed thereon, then a hearing on the plea and answer must have been waived by defendant's counsel. If the cause was heard on the whole case, and the decision made on the law and evidence, the court must assume that the decision was right, inasmuch as the evidence on which the judgment is founded is not given in the case.

Mr. Justice CATRON delivered the opinion of the court.

This case comes here on writ of error to the Circuit Court for the District of Louisiana; the proceeding below being by petition, according to the practice of that court.

It alleges in substance that about December, 1846, George H. Gossip and James D'Arcy were jointly and severally indebted to Ketchum, Rogers, and Bement, who recovered a judgment against said Gossip and D'Arcy in the Superior Court of the City of New York, for $1,418.81, and costs of suit, with interest on the principal sum after the rate of seven per cent. from February 1st, 1840. "Which judgment," says the petition, "was duly and legally obtained, and was and is valid and binding upon said debtors in the State of New York, where the same was rendered."

Among others, D'Arcy took the following peremptory exception: "The defendant excepts, that the judgment sued upon is not one upon which suit can be brought against the defendant in this court." The exception went to the merits, as it alleged that the action was not well founded, and was properly pleaded, in conformity to the 330th section of the Code of Louisiana Practice, page 128.

In the Circuit Court this exception was overruled, obviously on the assumption that the New York judgment was conclusive, and judgment was rendered against the defendant. And as this was done on an inspection of the record merely as if *nul tiel record* had been pleaded, the question is, whether the proceeding in New York bound D'Arcy.

It appears, among other things, that Gossip and D'Arcy were partners in trade, doing business in the name of Gossip & Co. They were jointly sued with two others. Process was served on Gossip, but none on D'Arcy, who was a citizen of Louisiana, and resided there. Gossip pleaded the general issue and gave notice of set-off, but at the trial permitted judgment to go against him by default, on which a jury assessed damages. On this verdict a judgment was rendered jointly against both Gossip and D'Arcy, by the court in New York.

This proceeding was according to a statute of that State which provides, that, "where joint debtors are sued and one is brought into court on process, he shall answer the plaintiff; and if judgment shall pass for plaintiff, he shall have judgment and execution, not only against the party brought into court, but also against other joint debtors named in the original process, in the same manner as if they had all been taken and brought into court by virtue of such process; but it shall not be lawful to issue or execute any such execution against the body or against the sole property of any person not brought into court."

For a settled construction of this statute in the State of New York, we are referred to the following cases: Dando *v.* Tremper, 2 Johns. 87; Bank of Columbia *v.* Newcomb,

6 Johns. 98; Taylor and Twiss v. Pettybone, 16 Johns. 66; and Carman v. Townsend, 6 Wend. 206.

From these cases it appears that in the New York courts it is held "that such judgment is valid, and binding on an absent defendant as *primâ facie* evidence of a debt, reserving to him the right to enter again into the merits, and show that he ought not to have been charged," should he be sued on the judgment; and furthermore, that the original contract is merged and extinguished by the judgment.

It follows, that, as D'Arcy's defence was in effect a demurrer to the record evidence, it could not have been made in the courts of New York.

And this brings up the question, whether the New York statute, and the judgment founded on it, bound a citizen of Louisiana not served with process; or, in other words, whether the judgment had the same force and effect in Louisiana that it had in New York. It is a question of great stringency. If it be true that this judgment has force and effect beyond the local jurisdiction where it was rendered, joint debtors may be sued in any numbers, and if one is served with process, judgment may be rendered against all; by which means the debt will be established: and as it must happen in numerous instances that one debtor may be found in a State carrying on so great a portion of our commerce as New York does, this mode of proceeding against citizens of other States and persons residing in foreign countries may have operation in all parts of the world, and especially in the United States. If New York may pass such laws, and render such judgments, so may every other State bind joint debtors who reside elsewhere, and who are ignorant of the proceeding. That countries foreign to our own disregard a judgment merely against the person, where he has not been served with process nor had a day in court, is the familiar rule; national comity is never thus extended. The proceeding is deemed an illegitimate assumption of power, and resisted as mere abuse. Nor has any faith and credit, or force and effect, been given to such judgments by any State of this Union, so far as we know; the State courts have uniformly, and in many instances, held them to be void, and resisted their execution by a second judgment thereon; and in so holding they have altogether disregarded, as inapplicable, the Constitution and laws of the United States. We deem it to be free from controversy that these adjudications are in conformity to the well-established rules of international law, regulating governments foreign to each other; and this raises the question, whether our federal Constitution and the act of Congress founded on it have altered the rule?

The Constitution declares, that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

By the act of May 26, 1790, Congress prescribes, first, the mode in which the judicial records of one State shall be proved in the tribunals of another; to wit, that they shall be authenticated by a certificate of the clerk under the seal of the court, with a certificate of the presiding judge that the clerk's attestation is in due form. Secondly, "And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them, in every court within the United States, as they have, by law or usage, in the courts of the State from whence the said records are or shall be taken."

These provisions were considered by this court in the case of Mills *v.* Duryee, 7 Cranch, 483, where it was held that the recited sentence of the act of 1790 did declare the effect of a State judgment, by enacting that it should have such faith and credit in every other State as it had in the courts of the State from whence it was taken; and that a judgment, where the defendant had been served with process, concluded such defendant from pleading *nil debet* when sued in another State on the record, and consequently from going behind the judgment and reëxamining the original cause of action; that he was concluded by the record, in like manner as he stood concluded in the State where the judgment was rendered.

This decision was made in 1813, and has since been followed as the binding and proper construction of the act of 1790, in cases where process has been served. But, as was then predicted, (and as has been manifest ever since,) great embarrassment must ensue if the construction, on the facts of that particular case, is applied to all others, without exception.

In construing the act of 1790, the law as it stood when the act was passed must enter into that construction; so that the existing defect in the old law may be seen, and its remedy by the act of Congress comprehended. Now it was most reasonable, on general principles of comity and justice, that, among States and their citizens united as ours are, judgments rendered in one should bind citizens of other States, where defendants had been served with process, or voluntarily made defence.

As these judgments, however, were only *primâ facie* evidence, and subject to be inquired into by plea when sued on in another State, Congress saw proper to remedy the evil, and to

provide that such inquiry and double defence should not be allowed. To this extent, it is declared in the case of Mills v. Duryee, Congress has gone in altering the old rule. Nothing more was required.

On the other hand, the international law as it existed among the States in 1790 was, that a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, when the defendant had not been served with process or voluntarily made defence, because neither the legislative jurisdiction, nor that of courts of justice, had binding force.

Subject to this established principle, Congress also legislated; and the question is, whether it was intended to overthrow this principle, and to declare a new rule, which would bind the citizens of one State to the laws of another; as must be the case if the laws of New York bind this defendant in Louisiana. There was no evil in this part of the existing law, and no remedy called for, and in our opinion Congress did not intend to overthrow the old rule by the enactment that such faith and credit should be given to records of judgments as they had in the State where made. The language employed is not only fairly open to construction, but the result arrived at by the court below depends on construction; and when we look to the previous law, and the evil intended to be remedied by the framers of the Constitution and by Congress, we cannot bring our minds to doubt, that the act of 1790 does not operate on, or give additional force to, the judgment under consideration; we concur with the various decisions made by State courts, holding that Congress did not intend to embrace judicial records of this description, and are therefore of opinion that the defendant's exception was valid, and that the judgment must be reversed; and so order.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs; and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions for further proceedings to be had therein, in conformity to the opinion of this court.

JOHN HORTSMAN, PLAINTIFF IN ERROR, *v.* JOHN HENSHAW, WILLIAM WARD, AND JOSEPH W. WARD, MERCHANTS AND COPARTNERS, DOING BUSINESS UNDER THE FIRM AND STYLE OF HENSHAW, WARD, & CO., DEFENDANTS IN ERROR.

Where a bill of exchange had upon it the forged indorsement of the payees, but it had been put into circulation by the drawers with such forged indorsement already upon it, and it was purchased in the market by a *bonâ fide* holder, who presented it to the drawee, who accepted and paid it at maturity, and then the drawers failed, the drawee cannot recover back the money which he had paid to the *bonâ fide* holder.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for Massachusetts.

The whole case is set forth in the declaration and bill of exceptions, which were as follows.

"JOHN HORTSMAN, of London, in that part of the kingdom of Great Britain and Ireland called England, a subject of the Queen of Great Britain and Ireland, alien to each and every of the United States of North America, and not a citizen of either or any of said States, Esquire, *versus* JOHN HENSHAW, WILLIAM WARD, and JOSEPH W. WARD, of Boston, in said District, merchants and copartners, doing business under the firm and style of Henshaw, Ward, and Company, and citizens of the State of Massachusetts, one of the United States of North America.

"In a plea of the case, for that whereas, heretofore, to wit, on the day of January, in the year 1845, the said defendants, by their agents at London aforesaid, presented to said plaintiff a certain bill of exchange in writing, made by certain persons under the name and style of Fiske & Bradford, at said Boston, on the 15th day of November, in the year 1844, directed to said plaintiff at London aforesaid, and requesting him, at sixty days after sight of that their first of exchange, second and third of same tenor and date unpaid, to pay to the order of Fiske & Bridge the sum of six hundred and forty-two pounds sterling; said bill of exchange purporting to be indorsed by said Fiske & Bridge, the payees thereof, and also indorsed by said defendants; and said defendants, through their said agents, required the acceptance and payment of the said bill of exchange by said plaintiff, and thereby represented to said plaintiff, and undertook, that said bill of exchange was true and genuine, and the signatures thereto and the indorsements thereon were also genuine; whereupon, confiding in the representations and undertakings aforesaid of said defendants, the said plaintiff accepted and paid the

amount of said bill of exchange, when the same became due and payable, to the said defendants, through their said agents; but the plaintiff avers that the said bill of exchange was not indorsed by said Fiske & Bridge, the payees thereof, or by any person or persons thereunto authorized by them, but that the indorsement thereon, purporting to be their name and signature, was a forgery, of which said defendants had due notice; by means whereof said bill of exchange became and was to said plaintiff wholly worthless and valueless, and the payment of the amount thereof to said defendants by said plaintiff, confiding and trusting in the representations and undertakings aforesaid of said defendants, was wholly without consideration; and that the representations aforesaid of said defendants, confiding in which said plaintiff accepted and paid the amount of said bill to said defendants, were untrue; and that said defendants have not complied with or fulfilled their undertakings and agreements aforesaid; and that thereby said defendants became and were justly indebted to said plaintiff in the amount of said bill, to wit, the amount of six hundred and forty-two pounds sterling, of the money of Great Britain; and, in consideration thereof, promised the said plaintiff to pay him the same when they should be thereunto requested.

"And, also, for that the said defendants, on the day of the purchase of this writ, being indebted to the plaintiff in the sum of five thousand dollars, for goods sold and delivered by the plaintiff to the defendants; and in the same amount for work done, and materials for the same, provided by the plaintiff for the defendants at their request; and in the same amount for money lent by the plaintiff to the defendants; and in the same amount for money received by the defendants to the use of the plaintiff; and in the same amount for money paid by the plaintiff for the use of the defendants at their request; and in the same amount for money due from the defendants to the plaintiff for interest of money before then due and owing from the defendants to the plaintiff, and by the plaintiff forborne to the defendants, at the defendants' request, for a long time before then elapsed; in consideration thereof, promised to pay the same to the plaintiff on demand, yet they have not paid the same; to the damage of the said plaintiff, as he says, the sum of five thousand dollars.

"This action was entered at the October term of this court, A. D. 1845, and was thence continued from term to term until the present term.

"And now the defendants come to defend, &c., and for a plea say that they never promised in manner and form as the

plaintiff doth allege in his writ, and of this put themselves on the country.

W. WHITING, *their Attorney.*

"And the plaintiff doth the like, by

FLETCHER WEBSTER, *his Attorney.*

"Issue being thus joined, the cause, after a full hearing, is committed to a jury sworn according to law to try the same, who, after hearing all matters and things concerning the same, return their verdict therein, and upon oath, that is to say:

"The jury find that the defendants did not promise in manner and form as the plaintiff hath alleged against them in his writ.

"It is therefore considered by the court that the said John Henshaw, William Ward, and Jos. W. Ward, recover against the said John Hortsman the costs of suit, taxed at ."

Bill of Exceptions.

"Circuit Court of the United States for the First Circuit, October term, 1846.

District of Massachusetts, ss.

"HORTSMAN v. HENSHAW ET AL.

"This was an action of assumpsit, brought to recover $3,114.70, and interest and damages.

"On the trial of the cause, the following facts were either proved or admitted.

"On the 15th day of November, 1844, at Boston, Fiske & Bradford, copartners, drew their bill of exchange for six hundred and forty-two pounds sterling, payable at sixty days' sight to the order of Fiske & Bridge, and directed the same to the plaintiff at London. Fiske & Bridge were a mercantile firm in Boston at that time.

"The names of Fiske & Bridge, the payees, were forged on the bill; said bill of exchange, with the forged indorsement of the payees' names, was delivered by the drawers, or one of them, to Thayer & Brothers, brokers, who sold the same, among other bills of exchange, in the usual course of business, to the defendants, *bonâ fide* and for full value.

"The defendants indorsed this bill to Baring, Brothers, & Co., at London, for collection, by whom it was presented to the plaintiff, and accepted by him, and paid at maturity on the 1st of January, 1845, and the proceeds placed to the credit of the defendants. This suit was commenced September, 1845. In April, 1845, the drawers became insolvent, and continued so to the time of the trial. One of them received his discharge under the insolvent laws of Massachusetts.

"It was not shown that said payees had any interest in or any knowledge of said bill of exchange, but the contrary.

"Neither the plaintiff nor the defendant had any suspicion of the forgery at the time of the sale and purchase, acceptance and payment, of the said bill; and no demand or notice to the defendants was proved to have been made in relation to said bill, or the subject-matter of said suit, prior to bringing this action.

"At the trial the plaintiff's counsel requested the presiding judge to charge the jury, that, if the forgery were proved, the defendants would be liable to refund to the plaintiff the amount paid them by him on said bill, with interest and damages; but the judge declined so to instruct the jury; and, on the contrary, ruled that if the drawers of the bill sold it for their own benefit, with the names of the payees indorsed upon it when it passed out of their hands, though such indorsement were forged, and received the amount of said bill, and afterwards remained in good credit until April, 1845, and then became insolvent, and have since remained so, and no notice was given to or demand made upon the defendants in relation to said bill or the subject-matter of this suit until this suit was commenced, then the plaintiff could not recover.

"Thereupon the jury found a verdict for the defendants.

"To these rulings the plaintiff's counsel excepted, and his exceptions, being found conformable to the truth, are allowed.

"PELEG SPRAGUE, *Judge, &c.*"

Upon this exception the cause came up to this court, where it was argued by *Mr. Fletcher Webster*, for the plaintiff in error, and submitted by *Mr. Curtis*, upon a printed brief prepared by *Mr. Whiting*, for the defendants in error.

The counsel for the plaintiff in error relied upon the following points.

1. No title can be acquired through a forgery. Johnson *v.* Windle, 3 Bing. N. C. 225, 229; Mead *v.* Young, 4 T. R. 28; Chitty on Bills, 10th Am. ed., 260; Canal Bank *v.* Bank of Albany, 1 Hill, (N. Y.) 287.

2. A bill is no payment to the person in whose favor it is drawn, unless indorsed by him. Smith *v.* Chester, 1 T. R. 654; Chitty on Bills, 261, 262, note.

3. An acceptor is not bound to know the handwriting of an indorser. Story on Bills, §§ 412, 451.

4. The indorser of a bill guaranties the genuineness of all signatures prior to his own; if he does not choose to make inquiries of any of the parties whose names appear on the bill,

having an opportunity of doing so, it is his own fault, and amounts to laches.

Where two parties are equally innocent, that one whose misfortune comes by his own negligence should bear the loss, and not he to whom no want of due caution can be attributed. Chitty on Bills, 430; U. States Bank *v.* Bank of Georgia, 10 Wheaton, 344, 354.

5. Immediate notice of forgery by the acceptor is not necessary in order to enable him to recover. Chitty on Bills, 261; 1 Hill, (N. Y.) 287.

6. Nor is notice necessary at all, unless when, for want of it, the rights of parties may be prejudiced or lost; where no such rights are affected, it is not necessary in order that the acceptor of a forged bill may recover of the holder. Chitty on Bills, 427; Johnson *v.* Windle, 3 Bing. N. C. 225.

7. But the plaintiff may recover back the money paid as having been paid under mistake. See cases before cited.

The points made by the counsel for the defendants in error were the following.

1. It is presumed that the drawee who accepts a bill has funds of the drawer in his hands; and, as against the holder, this could not be rebutted by proof of the fact. But in this case there is no such proof. See Chitty on Bills, 303 (10th Am. ed.).

2. Plaintiff's action is brought to recover money as paid under a mistake of fact; but the money was not paid under mistake of any material fact. Plaintiff lost nothing by forgery of payee's name, for the payee would not have been bound to the acceptor if his indorsement had been genuine. The acceptor gives credit only to the drawer, and not to any intermediate indorser.

3. The drawer, having sold the bill with the payee's name indorsed thereon, (whether forged or not,) and having received the amount of the bill, cannot deny the genuineness of the indorsement. The acceptor has only appropriated the funds of the drawer according to his request, and the drawer cannot deny that request. Lobdell *v.* Baker, 1 Metcalf, 193; Lobdell *v.* Baker, 3 Metcalf, 469.

4. Where any act of the drawer facilitates a forgery, the drawer must bear the loss; *a fortiori*, he must bear it where he negotiates a bill with a forged indorsement. But if the drawer is charged, the defendant is discharged. Byles on Bills, 250; Young *v.* Grote, 4 Bing. 253.

5. A bill payable to a fictitious person or order, and indorsed in the payee's name, will be deemed payable to bearer in favor

of a *bonâ fide* holder; and, in every case where the drawer indorses the payee's name on the note, it may be declared on as against the drawer as payable to bearer. Story on Bills, § 56; Vose *v.* Louis, 3 T. R. 182; Collins *v.* Emmett, 1 H. Bl. 313, 569; Tatlock *v.* Harris, 3 T. R. 174; Minet *v.* Gibson, 3 T. R. 481.

6. The plaintiff's proposition, that no title can be acquired by means of a forgery, is inapplicable to this case, because here the drawer delivers the note bearing the forged indorsement. And this case is distinguished from those where the acceptor has recovered money paid on a forged indorsement made after the bill left the drawer's hands; because in those cases the drawer did not order the acceptor to pay the holder, and in this case he does so order the acceptor.

7. The reason why the acceptor, paying a bill on the faith of a forged indorsement, may recover of the holder, is, that the holder has no title to the bill; but in this case the holder had a perfect title to the bill.

8. The indorser does not guaranty the genuineness of all previous signatures to the drawee, but his engagement with the drawee is discharged if the drawee has the drawer's authority for paying and charging him.

9. If the drawee in this case is a loser, it is because he has paid without funds of the drawer in his hands, and because the drawer has failed. But the indorser does not warrant to the acceptor the drawer's solvency, nor undertake to protect the acceptor in such a payment.

10. If the plaintiff could maintain his action in any event, it could not be without giving immediate notice of the forgery to the defendant. Cocks *v.* Masterman, 9 Barn. & Cres. 902; Smith *v.* Mercer, 6 Taunt. 76; Gloucester Bank *v.* Salem Bank, 17 Mass. 33; Bank of St. Albans *v.* Farmers and Mechanics' Bank, 10 Verm. 141.

11. No cause of action could accrue, until the plaintiff had demanded payment of the defendant.

Mr. Chief Justice TANEY delivered the opinion of the court.

The material facts in this case may be stated in a few words.

Fiske & Bradford, a mercantile firm, in Boston, drew their bill of exchange upon Hortsman of London, payable at sixty days' sight to the order of Fiske & Bridge, for six hundred and forty-two pounds sterling. The drawers, or one of them, placed the bill in the hands of a broker, with the names of the payees indorsed upon it, to be negotiated; and it was sold to the defendants in error *bonâ fide* and for full value. They transmitted it to their correspondent in London, and upon presentation

it was accepted by the drawee, and duly paid at maturity. The payees and indorsees all resided in Boston, where the bill was drawn and negotiated.

It turned out that the indorsement of the payees was forged, — by whom does not appear; and a few months after the bill was paid, the drawers failed and became insolvent. The drawee, having discovered the forgery, brought this action against the defendants in error to recover back the money he had paid them.

The precise question which this case presents does not appear to have arisen in the English courts; nor in any of the courts of this country with the exception of a single case, to which we shall hereafter more particularly refer. But the established principles of commercial law in relation to bills of exchange leave no difficulty in deciding the question.

The general rule undoubtedly is, that the drawee by accepting the bill admits the handwriting of the drawer; but not of the indorsers. And the holder is bound to know that the previous indorsements, including that of the payee, are in the handwriting of the parties whose names appear upon the bill, or were duly authorized by them. And if it should appear that one of them is forged, he cannot recover against the acceptor, although the forged name was on the bill at the time of the acceptance. And if he has received the money from the acceptor, and the forgery is afterwards discovered, he will be compelled to repay it.

The reason of the rule is obvious. A forged indorsement cannot transfer any interest in the bill, and the holder therefore has no right to demand the money. If the bill is dishonored by the drawee, the drawer is not responsible. And if the drawee pays it to a person not authorized to receive the money, he cannot claim credit for it in his account with the drawer.

But in this case the bill was put in circulation by the drawers, with the names of the payees indorsed upon it. And by doing so they must be understood as affirming that the indorsement is in the handwriting of the payees, or written by their authority. And if the drawee had dishonored the bill, the indorser would undoubtedly have been entitled to recover from the drawer. The drawers must be equally liable to the acceptor who paid the bill. For having admitted the handwriting of the payees, and precluded themselves from disputing it, the bill was paid by the acceptor to the persons authorized to receive the money, according to the drawer's own order.

Now the acceptor of a bill is presumed to accept upon funds of the drawer in his hands, and he is precluded by his acceptance from averring the contrary in a suit brought against him

by the holder. The rights of the parties are therefore to be determined as if this bill was paid by Hortsman out of the money of Fiske & Bradford in his hands. And as Fiske & Bradford were liable to the defendants in error, they are entitled to retain the money they have thus received.

We take the rule to be this. Whenever the drawer is liable to the holder, the acceptor is entitled to a credit if he pays the money; and he is bound to pay upon his acceptance, when the payment will entitle him to a credit in his account with the drawer. And if he accepts without funds, upon the credit of the drawer, he must look to him for indemnity, and cannot upon that ground defend himself against a *bonâ fide* indorsee. The insolvency of the drawer can make no difference in the rights and legal liabilities of the parties.

The English cases most analogous to this are those in which the names of the drawers or payees were fictitious, and the indorsement written by the maker of the bill. And in such cases it has been held that the acceptor is liable, although, as the payees were fictitious persons, their handwriting of course could not be proved by the holder. 10 Barn. & Cres. 478. The American case to which we referred is that of Meachim *v.* Fort, 3 Hill, (S. C.) 227. The same question now before the court arose in that case, and was decided in conformity with this opinion.

Another question was raised in the argument upon the sufficiency of the notice; and it was insisted by the counsel for the defendants, that, if they could have been made liable to this action by the plaintiff, they have been discharged by his laches in ascertaining the forgery and giving them notice of it.

But it is not necessary to examine this question, as the point already decided decides the case.

The judgment of the Circuit Court is affirmed, with costs.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Massachusetts, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed with costs.

WILLIAMS C. BEVINS AND OLIVER P. EARLE, SURVIVING PARTNERS OF THE FIRM OF BEVINS, EARLE, & CO., WHO SUE FOR THE USE OF OLIVER P. EARLE, APPELLANTS, *v.* WILLIAM B. A. RAMSEY, ROBERT CRAIGHEAD, JAMES P. N. CRAIGHEAD, THOMAS W. HUMES, AND JAMES McMILLAN, ADMINISTRATOR OF ANDREW McMILLAN, DECEASED.

Where a case is brought up by an appeal from a judgment on the common law side of the Circuit Court, instead of by a writ of error, it must be dismissed.

Order.

THIS cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of East Tennessee. And it appearing to the court that this case is brought up by an appeal from a judgment on the common law side of the Circuit Court, instead of by a writ of error, it is ordered, adjudged, and decreed by this court, that this cause be, and the same is hereby, dismissed, with costs.

THOMAS M. LEAGUE, PLAINTIFF IN ERROR, *v.* JOHN DE YOUNG, SURVEYOR FOR THE DISTRICT OF GALVESTON, AND SAMUEL P. BROWN, DEPUTY.

Before the admission of Texas into the Union, that State passed many laws upon the subject of head rights to land, the general object of which was to ascertain and secure valid titles, and prevent frauds, by acts of limitation and by the establishment of boards of commissioners to separate the bad from the good titles.

In the constitution adopted just before her admission into the Union, there was an article annulling fraudulent certificates, and opening the courts, up to a certain day, to suitors for the investigation of their claims.

It was perfectly competent for the people of Texas to pass these laws and adopt this constitution.

Moreover, they were all passed before the Constitution of the United States had any operation over Texas, and cannot therefore be in conflict with any of its provisions.

THIS case was brought up from the Supreme Court of the State of Texas, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

The plaintiff in error, Thomas M. League, applied to the District Court for the county of Galveston, in Texas (State court), for a mandamus to be issued to John De Young, the surveyor, and his deputy, to compel them to survey a league and labor of land, which League alleged that he was entitled to by virtue of a certificate issued to Catin F. McRea by the board of land commissioners of the county of San Augustine,

republic of Texas, on the 21st of June, 1838; which certificate League alleged had been assigned to him.

Instead of tracing, chronologically, the history of the laws, the reporter refers to the narrative given in the opinion of the court. The following is a list of the public documents set forth by the petitioner as exhibits to his petition, and which occupied upwards of a hundred printed pages of the record.

1. A decree of the Congress of the State of Coahuila and Texas. March 24, 1825.
2. Instructions to Commissioners. September 4, 1827.
3. Decree of the Congress of the State of Coahuila and Texas. May 2, 1835.
4. Declaration of the People of Texas in General Convention assembled. November 7, 1835.
5. Establishment of a Provisional Government in Texas. November 13, 1835.
6. Declaration of Independence of Texas. March 2, 1836.
7. Constitution and Declaration of Rights of Texas. March 17, 1836.
8. An act entitled "An act to reduce into one act, and to amend, the several acts relating to the establishment of a General Land-Office." December 14, 1837.
9. Joint Resolution respecting County Surveyors. December 29, 1837.
10. An act amending an act supplementary to an act entitled "An act to reduce into one act, and to amend, the several acts relating to the establishment of a General Land-Office." January 26, 1839.
11. An act to detect fraudulent land certificates, and to provide for issuing patents to legal claimants. January 23, 1840.
12. An act prohibiting the location of fraudulent land claims. February 5, 1840.
13. An act to provide for the return of surveys, for the collection of government dues on lands, and for other purposes. February 5, 1840.
14. An act defining the mode by which the holders of conditional certificates shall establish the same. January 15, 1841.
15. An act supplementary to an act to detect fraudulent land certificates, and to provide for issuing patents to legal claimants. February 4, 1841.
16. An act supplementary to an act supplementary to an act to detect fraudulent land certificates, and to provide for the issuing patents to legal claimants. 1843.
17. Ordinance of the Convention of Texas, accepting the proposal of the Congress of the United States to admit Texas into the Union. July 4, 1845.

18. Constitution of the State of Texas. 1845.

19. An act to establish a General Land-Office for the State of Texas. May 12, 1846.

On the 30th of June, 1847, League filed his petition in the District Court for the first judicial district of the State of Texas, in and for the county of Galveston.

On the 1st of December, 1847, the District Court laid a rule upon the defendants to show cause why a peremptory mandamus should not issue as prayed, and on the 21st of December, 1847, the defendants filed a general demurrer and exception, upon the ground that the plaintiff's petition is not sufficient in law. The following is a summary of their answer.

1st. Because it does not appear that the plaintiff has any cause of action against the defendants.

2d. Because this is really a suit against the State of Texas, which has not given its consent to be so sued.

And for further special exceptions the defendants say,—

1st. It does not appear from said petition that the people of Texas made any contract by which they were or are bound to concede, grant, or perfect title to, any such land, &c.

2d. It does not appear that the said supposed rights and claims to land of persons residing in Texas on the day of the declaration of independence were ever vested and established, as the plaintiff in his said petition alleges and pretends.

3d. Because the constitution of the republic of Texas amounts to no contract between the people of Texas in their corporate capacity, &c., and any persons or class of persons residing in Texas, as the plaintiff in his petition pretends; nor does it appear that the people of Texas, in their corporate political capacity, agreed, contracted, or promised as the plaintiff alleges and pretends.

4th. It does not appear that the general land law of the republic of Texas ever amounted to a contract between the people of Texas and any person in the petition mentioned, nor does it appear that said people, through their representatives, ever promised, contracted, or agreed that such certificate should be sufficient evidence to authorize any lawful survey, or, for any person holding or owning such certificate, to survey such lands as he might point out, &c.

5th. It does not appear that the said people contracted or agreed that such certificate should be sufficient evidence to authorize the surveyor, &c., to survey any lands forming a portion of the public domain; or that they are bound to make such survey; or that by refusing so to do they are guilty of any neglect or breach of duty.

After reserving all exceptions, &c., the defendants for plea

say, the plaintiff ought not to have or maintain his action, for that the general land law is unconstitutional, &c.

And for further plea they say, that the act "to detect fraudulent land certificates," and that "to prohibit the location of fraudulent land claims," &c., and the act "supplementary to the act to detect fraudulent land certificates," &c., were not made in violation of the constitution of the republic of Texas, as the said plaintiff pretends; nor do said acts, nor does the eleventh article of the constitution of the State of Texas, contravene the Constitution of the United States, as said plaintiff also pretends; and that the said plaintiff (as he admits) never established said certificate according to said acts, or according to said eleventh article, nor has he attempted so to do.

For further plea he says, the board of general and local commissioners under the first-mentioned act failed and refused to report this certificate as genuine; that its location was prohibited until so reported, or established under the said supplementary act, or the said eleventh article; and that, until it might be so established, the said plaintiff was entitled to no location or survey thereof.

That the said supplementary act, while it remained in force, and the said eleventh article, gave a sufficient and an adequate mode of establishing said certificate, which said plaintiff failed to adopt; and that he has not made the proof, nor complied with the requisites, prescribed by the said eleventh article of the constitution of the State of Texas.

They answer that they were not bound to make said survey, and that their said refusal has violated no law nor any legal right of the plaintiff, and amounts to no breach or neglect of duty on their part.

The defendants annexed two exhibits to their answer; one was "An Act to regulate proceedings in the District Courts," consisting of 158 sections, and occupying thirty pages of the printed record, and the other, "Rules for the Government of the District Courts, adopted by the Supreme Court, 23d April, 1847."

On the 22d of December, 1847, the District Court, after argument, dismissed the rule which had been laid *nisi* upon the defendants, and at December term, 1847, the Supreme Court of Texas, to which the case had been carried, affirmed the decision.

League sued out a writ of error, and brought the case up to this court.

It was argued by *Mr. Ovid F. Johnson* and *Mr. Wood*, for the plaintiff in error, and *Mr. Harris*, for the defendant in error.

The counsel for the plaintiff in error made the following points.

I. The decision of the commissioners awarding the head right certificate set forth in the pleadings, was a judicial decision.

First. The republic was bound under a prior obligation to award the land. Constitution of Republic, § 10; Colonization Law of Coahuila and Texas, 1825; Decree No. 16, p. 15; 1 White's New Recopilacion, p. 559; Decree of Coahuila and Texas, No. 309, p. 297; Declaration of People in Convention, art. 8, p. 4; Plan of Provisional Government, art. 15; Declaration of Independence, p. 4; Acts establishing General Land Office, Dec. 14, 1837, §§ 11, 15, 17, 36; Laws of 1837, p. 62.

Second. The proceedings involved a *lis pendens*, a subject-matter to be settled between the claimant and the government. Midhurst *v.* Waite, 3 Burr. 1259; 2 Hill, 11, 14; 26 Wend. 212, 220.

Third. The subject-matter to be settled required, and the acts provided, that proof should be taken, and in some cases a jury was introduced in order to ascertain and settle the rights of the parties. Act of 1837, §§ 11, 17.

Fourth. An appeal to a higher tribunal was given to the claimant in case the decision was against him. The State dispensing with such appeal in its own behalf, on the ground that the commissioners, as is usual in such cases, were designed to represent them. McMin *v.* Stafford, 2 Bibb, 487; 19 Wend. 56, 59; 9 Ib. 508; 8 Johns. 44, 69; 3 New Hamp. 265; 4 Bingham, 686; Phillips on Evidence, Cowen & Hill's notes, pp. 906 – 915, No. 637; Ib. 997, 1000, No. 694; Ib. 853, No. 609; 1 Peters, 201, 666, 667; 1 Bibb, 22, 229; 3 Bibb, 137, 426; 3 Littell, 152, 154; 7 Dana, 141; 4 Yerger, 525; 6 Yerger, 85, 86; 2 Dall. 317.

Fifth. The powers were transferred to the District Court by the act of 1839.

Sixth. The fact that proceedings are summary does not divest them of their judicial character.

II. The proceedings being judicial, the decision therein, that the claimant is entitled to a head right certificate, is also judicial.

III. The said decision, and the head right certificate issued and founded upon it, is a perfect right to the quantity of land awarded, forming an obligatory contract, as solemn and binding as a more formal judgment, and is conclusive unless reversed upon review for error, and cannot be impeached collaterally. 1 Douglass, 407; 4 Greenleaf, 531; Le Guen *v.* Gouverneur and Kemble, 1 Johns. Cas. 437; 19 Wend. 56; Moody *v.* Thurston, Strange, 481; Grignon's Lessee *v.* Astor, 2 How-

ard, 319; Hargrave's Law Tracts, 446; 1 Salkeld, 396; 2 Bos. & Pul. 392; 1 Bibb, 22, 229; 2 Bibb, 487, 488, 134; 3 Bibb, 137, 138, 426; 3 Litt. 152, 160; 7 Dana, 141; 2 Tennessee R. 21; 1 Yerger, 303, 328, 346, 350; 4 Yerger, 525; 1 Cook, 214, 216; 1 Stewart, 504; Walker, 492; 1 Peters, 666, 667; 18 Peters, 517; 7 Wheat. 240, 244; 1 Peters, 212; 8 Peters, 444; 9 Peters, 153, 154; 20 Howell's State Trials, 538; Ambler, 761; 7 T. R. 269; Co. Lit. 303, *c*; 4 Rawle, 288; 1 Salkeld, 230; 7 Missouri R. 15; 5 Howard, 28; 6 Peters, 728, 732; 1 Texas R. 438, 788, 801, 802, 804; 6 Peters, 728, 732; 6 Cranch, 87 *et seq.*; 9 Howard, 171, 445, 447; 7 Durnf. & East, 692, per Ld. Kenyon; 3 Dallas, 54; 1 Peters, 340; Cowen and Hill's Phillips, 891; 5 Johnson, 689; Smith *v.* Lewis, 1 Irish T. R. 20, 43; 2 Bos. & Pul. 392; 13 Peters, 498; Mackeldy, Comp. Civil Law, Kauffman's ed., § 208; 1 Pothier on Cont. (Evans's edition), 350, 416; Hugo, Histoire du Droit Romain, § 373; Dig. 2, 17, 50; Code, 752; Extravaganza, 2, 27; 1 Moreau and Carlton's Part. 321; Recop. Castella, tit. 4, 6, 17; Institutes, 292; 1 White's New Recop. 306, 307; 2 Texas R. 320, 272.

IV. A judgment establishing and conferring a general right is just as obligatory as if it awarded a specific parcel of land or personal property, and is as much protected by the Constitution.

V. The decision in question was complete, and not inchoate, and adequate remedies had been provided for its execution.

VI. The acts of 29th January, 1840, 5th February, 1840, 4th February, 1841, 12th May, 1846, and the State constitution of 1845, article 11, delay and hinder this claimant in enforcing his said decision as well prior as subsequent to the annexation of Texas: and, so far as they delay and hinder the enforcement of said decision since the annexation, they violate the United States Constitution, and prior thereto the Texas Declaration of Rights of 1836. 2 Howard, 608; 10 Conn. 522, 541; 1 Pick. 224; 13 Vermont, 525; 2 Stewart, 30; 1 Dana, 481, 486; 9 Yerger, 490; Minor, 23; 7 Gill & Johns. 7; 17 Johns. 195, 215; 3 Howard, 133; 4 Wheat. 122, 197; 1 Howard, 311; 4 Litt. 47; 8 Wheat. 1; 1 Denio, 128; 4 Gill & Johns. 146, 148; 9 Howard, 245; 6 Cranch, 87; 1 Simons, 251; 2 Chancery R. 497; 4 Wheat. 5, 18; Peck, 18; 4 Litt. 34, 47; Story on Const. §§ 1368, 1391; 2 Ld. Raym. 952; 3 Greenleaf, 326; 2 Texas R. 319, 320.

First. The constitution of the State of Texas of 1845, article 7, § 20, provides "that the rights of property and of action which have been acquired under the constitution and laws of the republic of Texas shall not be divested." And as the rights of property and of action in this case were so acquired, established, and protected by the decision of the board of land

commissioners, they could not be divested, barred, or affected by attaching to their assertion such conditions as are specified in the eleventh article of the said constitution. Nor could the said rights be utterly barred, and declared to be for ever null and void, as in the said last-mentioned article is attempted to be done.

Second. The certificate produced in this case never was declared to be null and void by any law of the republic of Texas, and, upon the adoption of the State constitution, was conclusive evidence of a valid and subsisting right founded on contract, although delayed and clogged by such unauthorized modifications of the remedy for its enforcement as precluded the plaintiff from the immediate enjoyment of its benefit.

Third. The State constitution recognized the right founded upon it, but sought to couple it with such remedies as impaired the obligation, and finally destroyed it altogether, in direct violation of the provisions of the federal Constitution.

Fourth. The certificate, as a judicial act, estopped the State from denying the right it established; and the subsequent steps necessary to obtain a patent being mere ministerial acts, the State had no authority so to regulate them, or to obstruct their performance, as to impair that right. The remedy was subject to such modification as the State saw fit to make without prejudice to the right; but that was absolute and inviolable.

Fifth. All the laws formerly in force in the republic of Texas, now alleged to be in force in the State of Texas, and relied on to defeat and hinder the plaintiff in procuring a survey and patent on the certificate described in this suit, are in force by virtue of their supposed adoption, continuance, and recognition by the State constitution, and as such are in manifest derogation of the provision of the federal Constitution prohibiting the passage of laws impairing the obligation of contracts.

VII. This court has jurisdiction on writ of error to review the decision of the Supreme Court of Texas, it being the highest court of law within that State, and involving the validity of a statute, as well as a constitutional provision of this State, together with the authority exercised under them, on the ground of their being repugnant to the United States Constitution, and of the decision in favor of their validity. Constitution U. States, Art. 1, § 10; Act of Congress, Sept. 24, 1789, § 25; Constitution of Texas, 1837; Declaration of Rights, Art. 16.

It is sufficient if it appear on the record that the question must have arisen. Davis *v.* Packard, 6 Peters, 41; Hickie *v.* Starke, 1 Peters, 94; Harris *v.* Dennie, 3 Peters, 292; Smith *v.* Hunter, 7 Howard, 738.

Rights of property remain the same after as before the adoption of the State constitution. State Constitution, Art. 7, § 20; 7 Peters, 51, 87; 1 Dall. 78; 2 Dall. 394, 395.

VIII. The common law was in force in Texas in 1837 (Laws of Texas, 1836, pp. 156, 157), and the mandamus in the present case was the appropriate remedy. Marbury *v.* Madison, 1 Cranch, 137; Bradley *v.* McCrab, Dallam's Digest, 504, 506, 524, 381; Boman *v.* Moody, Dallam, 512; Allen *v.* Ward, Dal. 371, 137; Dallam, 366; 2 Texas R. 57, 357, 451, 67, 78; Hartley's Dig. 120; Hartley's Dig. 237, art. 643; 12 Peters, 620; 1 Texas R. 84, 85, 542; 1 Simons, 251.

IX. No other constitutional remedy has been provided in Texas for the present case; and not to allow the mandamus would be a denial of justice, and would defeat the provision of the United States Constitution. In regard to impairing the obligation of contracts, a dissent on the part of the State to the remedy cannot be inferred from acts providing an unconstitutional remedy. Directory upon government, 9 Marsh. 423; Angel & Ames, 137, 138, 157; 1 Mur. 155; 4 Cow. 297; 7 Cow. 402; 5 Cow. 269; 8 Barn. & Cres. 29; 11 Wend. 611; 5 Hill, 21; 5 Jacob's Law Dict. 76; 6 Hill, 62, 646; 3 Serg. & Rawle, 29.

The counsel for the defendant in error made the following points.

The writ of error alleges that the decision of the Supreme Court of Texas was against the validity of the treaty of the United States which was drawn in question, and was in favor of the statutes and of the eleventh article of the constitution of the State of Texas, which were drawn in question on the ground that they were repugnant to the Constitution, treaties, and laws of the United States.

It is respectfully submitted, that the only treaty which can possibly bear any relation whatever to the merits of this cause is that by which Texas was annexed to the United States; and in considering the terms and stipulations of that treaty, it seems difficult to arrive at the conclusion that it intended to make valid that class of claims to which this belongs. The reverse of the proposition appears to conform much more to the intention of the treaty.

For the joint resolution of Congress for the annexation of Texas provides, "that the territory belonging to the republic of Texas may be erected into a new State with a republican form of government, to be adopted by the people of said republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union."

It further provides, that "the constitution of said State, with the proper evidence of its adoption by the people of the said republic of Texas, shall be transmitted to the President of the United States, to be laid before Congress for its final action, on or before the 1st of January, 1846."

The proposition contained in this joint resolution was assented to by the government of Texas, and it was also assented to by the people of said republic, by an ordinance of the deputies, in convention assembled, on the 4th of July, 1845.

A constitution for the State of Texas was formed in accordance with the provisions of the said joint resolution. Among other things, this constitution contains a provision that it shall be submitted to the people of Texas (for their adoption or rejection) on the second Monday in October, 1845; and it further provided, that at the same time the vote should be taken for and against annexation. The eleventh article also provided, that certificates of the class upon which this suit was instituted should be established according to the provisions of the aforesaid supplementary act, before the 1st of July, 1847, and if not so established or sued upon as therein provided before that time, the said certificates, and all locations and surveys thereon, should be for ever null and void. It further provided, that the aforesaid ordinance should be attached thereto and form a part thereof.

This constitution was adopted, and annexation was assented to by the people of Texas. The constitution, the evidence of its adoption by the people of Texas, and their assent to annexation, have been duly transmitted to the President of the United States. Upon these, with all their terms and conditions, by a joint resolution of Congress, Texas was admitted as one of the States of the Union.

Then here was a proposition for annexation made by the government of the United States. The proposition is accepted by Texas, but, among other things, upon the conditions contained in the eleventh article of her State constitution. These conditions are accepted and adopted by the general government. Then we contend that this article cannot be justly said to be repugnant to any treaty of the United States. On the contrary, it may be said to be incorporated into the treaty for annexation, and to form a part of it. So far from being condemned by the treaty, it is most solemnly guaranteed by it.

It may be considered to be a more correct view of the subject to say that Texas proposed to be annexed to the United States, and, among other things, upon the conditions contained in the eleventh article of her State constitution; and that this proposition was accepted by the "joint resolution of Congress

for the admission of the State of Texas into the Union." Upon either view of the subject, this article forms a part of the treaty, and is sustained, in place of being condemned, by it.

If these views of the subject be considered as at all correct, then the eleventh article of the constitution of the State of Texas violates no law of the United States; for the joint resolution last aforesaid may be said to be a treaty, or a law, or a contract (for it partakes of the nature of all these) of the United States, in which this article may be said to be fully incorporated as a part of either. Then, so far from being considered as a violation of any law of the United States, it may itself be regarded as a law of that government.

Let us now see whether the said acts of the republic of Texas, or the eleventh article aforesaid, at all contravene that provision of the Constitution of the United States which says, that "no State shall pass any law impairing the obligation of contracts." Now it would seem obvious enough, that laws enacted by Texas, and a constitution adopted by her when she was an independent republic, could in no wise contravene the Constitution of the general government. Texas being then a separate republic and an independent government, could not have been considered as restrained by a constitutional provision against the States of this Union. It cannot be said that these laws or this article were made in violation of the terms of the Constitution of the United States. And it does not seem to be consistent either with the terms or with the spirit and meaning of that instrument, to say that the convention which framed or the people who adopted it designed this clause as an inhibition against separate or independent republics or nations.

Again, it is obvious enough that it was not the intention of this clause to inhibit Congress from passing any law, or making any treaty, impairing the obligation of contracts. And whether we view the annexation of Texas as affected by the one or the other of these means, we must still agree that it was consummated by the consent and act of Congress. And, in whatever view it may be seen, we most respectfully contend, that it must still be regarded as a law, or an act of Congress, unrestrained by this clause of the Constitution of the United States.

And viewing annexation as a contract between two independent nations, and both equally competent to contract, it seems consistent with reason and law, that both of the contracting parties should be bound by all its terms and stipulations. It would certainly be a departure from the ordinary construction of contracts to determine that in this instance it was bind-

ing upon one side only. The want of equity of such an interpretation becomes extremely prominent, when it is borne in mind that the provisions of the eleventh article of her State constitution were offered, on the part of Texas, as an indispensable condition of the contract.

And it is further contended, that there never existed between the grantee of the certificate and either the republic or the State of Texas, any contract which the aforesaid acts of the republic, or the eleventh article of the constitution of the State, could have impaired. The only law under which the grantee could claim any land of the republic was decree No. 190 of the Congress of the State of Coahuila and Texas (see Laws Coahuila and Texas, 189); or the act of 1835 (see Laws Coahuila and Texas); or the tenth section under the general provisions of the constitution of the Republic of Texas. Now, in order to make the contract valid between the grantee and the State of Coahuila and Texas, he must have complied with the provisions of the said decree No. 190, particularly that contained in the eighth article, and then, by the twenty-second article, he would have been entitled to the one half of a *sitio* of grazing land. It will be seen from the certificate that the grantee was a foreigner; for it says that he proved he arrived in the republic of Texas in the year 1834. Then we contend, that if the claim be regarded as being based upon that law, viz. decree No. 190, it amounted to no contract, for there is nothing to show that the grantee ever complied with its requisitions, and the quantity contained in the certificate very far exceeds that prescribed by the law.

If, on the other hand, it be regarded as based upon the said act of Coahuila and Texas of 1835, or the said tenth section of the constitution of the late republic, then we contend that there was no contract between the grantee and the republic; for, by reference to the act of 1835, and to this section of the constitution, it will be seen that their provisions only amount to a donation of lands to those persons who were residing in Texas before the passage of the act of 1835, or on the day of the declaration of independence.

In addition to the head rights which the citizens received, the republic paid each soldier for whatever services he might render. Ordinances and Decrees of the Constitution, 22, §§ 4, 5; Ibid. 78, 79, 87, 88, 93; and 1 Statutes, 34, § 4.

Upon these provisions alone claims for head rights rested, until the 14th of December, 1837, when the Congress of the republic passed an act, entitled "An Act to reduce into one act, and to amend, the several acts relating to the establishment of a general land-office." See 2 Laws, 62. It will

be seen by reference to this act (particularly its twelfth section), that this gave to colonists, or persons residing in Texas, no new right, but only intended to provide an adequate remedy by which those rights might be rendered available which had accrued under the said colonization laws, and under the said tenth section of the constitution of the republic. It was, in other words, a law creating a remedy by which preëxisting rights might be litigated; but it purported to give no new right, and least of all does it seem to intend to create, on the part of the republic, a technical and binding contract, which subsequent enactments could never change. And we contend that the right to any land exists (if it exists at all) by virtue of a compliance, on the part of the grantee, with the provisions of the colonization law of 1832, or in consequence of his having been included within the provision of the act of 1835, or that of the tenth section under the general provisions of the constitution of the late republic, and not by virtue of any certificate obtained under the act of 1837, which, we contend, relates not at all to the right, but to the remedy only. In other words, if he had any right, it was not because he obtained the certificate under the act of 1837, but because he had made with the State of Coahuila and Texas a valid contract for it under the act of 1832, or because it had been donated to him by the act of 1835, or by said tenth article in the constitution of the late republic.

We contend that the issuance of the certificate created no contract whatever on the part of the government. For the granting of the certificate was based upon no consideration; whereas, under every system of laws, a consideration is an indispensable requisite of a legal and valid contract.

And it will be clearly seen, by reference to the acts of 1840, and to the eleventh article of the constitution of the State, that they affect no right which may have accrued either under the act of 1832 or under that of 1835, or the said tenth section of the constitution of the late republic. They neither affect to repeal the law of 1832, nor that of 1835, nor to render null any right or contract which existed in virtue of their provisions; nor do they affect to withdraw, or to defeat, or to impair this constitutional provision. So far from annulling, or divesting, or destroying these rights, it was the direct object and tendency of the acts of 1840, and of the constitutional provision of 1845, to guard, to sustain, and to secure them.

The acts, &c., complained of by the plaintiff in error, only intended to change the remedy provided by the act of 1837; and this is all which they really effect.

The republic of Texas was not bound, by the terms of any

contract, to pass the act of 1837. This was a law gratuitously passed by its legislature. The republic had entered into no obligation or contract to pass such a law; and least of all had it obligated itself to permit this remedial law to remain for ever unchanged. Nor was there an application for a survey while the provisions of the seventeenth section of the act of 1837 remained in force; but he waited till the proffer contained in that section was in effect repealed, or withdrawn, by the act of 1840.

Again, remedial laws may, at any time, be altered, or even repealed.

This action, it may be said, is based entirely upon the seventeenth section of the act of 1837. And this section, by its terms, contemplates the passage of subsequent laws altering its provisions.

This section regards the certificate, not as a contract, but as "sufficient evidence to authorize the surveyor to survey the land." The terms of the section give to the certificate that force only. Now, *evidence* belongs to the *remedy;* and the legislature can, at any time, alter, or even repeal, the remedy. Story, Conflict of Laws, § 467, note; Townsend *v.* Townsend, Peck, 15–18; 6 U. S. Cond. Rep. 535; Mason *v.* Haile, 12 Wheat. 370; Sampeyreac case, 7 Peters, 222; Ibid. 546, 549, 550, 557; Springfield *v.* Hampden Commissioners, 6 Pick. 508.

An act, like that of 1837, which confers jurisdiction, is subject entirely to the control of the legislature. Stoover *v.* Immell, 1 Watts, 258; Road in Hatfield, 4 Yeates, 392. The repeal would have divested all such rights, under the provisions of the act, as have not been consummated. Buller *v.* Palmer, 1 Hill, 324, 330; Meller's case, 1 Blackf. 451; Meiggs *v.* Hunt, 12 Moore; Rey *v.* Goodwin, 4 Moore & Payne, 441, 451; Dwarris on Statutes, 676.

If the above position be correct, then Texas had the power to modify or change the act of 1837 by those of 1840.

It is conceived that the Sampeyreac case, 7 Peters, 222, bears a striking analogy to this. In that case suit was instituted in the Superior Court of the Territory of Arkansas, in the name of Bernardo Sampeyreac, against the United States, to recover a tract of land in the petition described. During the same year (about the 20th of December) a judgment was rendered in favor of the plaintiff. No appeal was taken within one year; and consequently, by the terms of the statute under which the suit was instituted, the decision became final and conclusive between the parties. The interest in this decree was by deed (purported to be made by Sampeyreac) transferred to John J. Bowie, and in December, 1828, Bowie trans-

ferred the decree to Joseph Stewart. On the 13th of December, 1828, Stewart's application was admitted in the land-office. At the April term, 1830, the United States attorney filed a bill of review, in which he stated that the decree was obtained by fraud, that the witnesses committed perjury, and that Sampeyreac was a fictitious person. Subsequently to this, viz. on the 8th of May, 1830, an act was made giving the courts power to revise such decrees upon bills of review. It was contended that the act of 1830 was unconstitutional, because made in violation of that provision of the Constitution of the United States which says that "no person shall be deprived of property without due process of law"; and also that which says that "private property shall not be taken for public use without just compensation." See Dartmouth College v. Woodard, 4 Wheat. 644, 645. But the decree in the Sampeyreac case was reversed; and it was decided that the act of 1830 applied only to the remedy, and therefore did not violate the Constitution of the United States.

When the certificate was issued, and when the acts of 1837 and 1840 were enacted, the laws of Mexico were in force in Texas. That system provides, that, if a judgment be fraudulent or be obtained by perjury, the party against whom it was rendered may have it annulled at any time within twenty years from the day of its date, &c. 1 Partidas, 321, 322; 1 White, 306.

Again, this is a mandamus against the State without its consent; and it is an attempt to evade the well-established principle, that the sovereign authority cannot be sued in its own courts without its express assent to the suit.

Where a party has another specific remedy, a mandamus never issues at all. 5 Comyn's Dig. 21. The act of 1840 did not take away all remedy, and the act of 1841 gave a remedy which is reasonable, adequate, and complete.

It is contended that the plaintiff in this cause can occupy no higher ground than that which could have been occupied by the grantee of the certificate. The certificate is at best but the evidence of a naked right or a chose in action, which by the general law was neither assignable nor transferable. And there is no special law which enables the grantee to sell or transfer the certificate. But the tenth section under the general provisions of the constitution of the republic, the fifteenth section of the first general land law (1 Laws, 129), and the twelfth and seventeenth sections of the present act, only made valid the sale or transfer of the right which the claimant had to the land. He could sell his own right or claim to the land, but nothing more.

This court has decided that the clause in the Constitution of the United States, upon which the plaintiff relies, has no retrospective operation. Owings *v.* Speed, 5 Wheat. 420.

The case under consideration is stronger than the one cited; for the acts of 1840, and the constitutional provision of 1845, were in full force when Texas was an independent republic, and their continuance may be said to be guarantied by the treaty of annexation.

The case of Calder *v.* Bull (3 Dall. 386) may be said to bear a striking similitude to this. There the Probate Court had rendered a decree in that cause, and the adverse party had so long slumbered over his rights, that this decree had, under the law, become final by the lapse of time. The State of Connecticut then passed a law annulling this decree, and this court unanimously determined that this law did not violate the Constitution of the general government. A State can pass retrospective laws creating contracts where none existed before; it can pass retrospective laws; can exercise judicial functions; and it can pass a law that will divest vested rights. Satterlee *v.* Matthewson, 2 Pet. 412, 413.

These are powers certainly as great as those complained of, which Texas exercised while she was a separate republic.

We might suppose this to be a contract in the strict sense of that term, and still we believe it could be successfully contended that the acts of 1840 never even violated the constitution of the late republic, and that the eleventh article of the State constitution could, under no view, violate the Constitution of the United States. For the "obligation" of a contract is defined to be "the law that binds a party to perform his undertaking." Sturges *v.* Crowninshield, 4 Wheat. 197; Ogden *v.* Saunders, 12 Wheat. 318; Blair *v.* Williams, 4 Littell, 34; Lapsley *v.* Brashear, Ibid. 47.

The Constitution refers to and preserves the legal, not the moral obligation. Ogden *v.* Saunders, 12 Wheat. 337.

The "obligation" of contracts intended by the constitution is not the universal law of civilized nations any more than the moral law, &c. Ogden *v.* Saunders, 12 Wheat. 213.

The republic never gave its consent to be thus sued; and had it been given, it might have been withdrawn at pleasure. Story's Const. 625. So that the republic could not have been legally bound to perform its contracts; or, in other words, there was no legal obligation to perform them.

Under the Constitution of the United States, and amendments thereto, a State cannot be sued in the courts of that government, except by another State. Then under this government there are no means of compelling a State to perform

its contracts with individuals, in cases in which the State may be defendant. Then there is no legal obligation to perform them. See second section under article third, and the eleventh article of the Amendments.

Texas was not annexed until the 16th of February, 1846, the day on which the first legislature of the State convened. See the joint resolution for annexing Texas, &c., approved the 1st of March, 1845; 5th, 6th, 7th, and 8th sections of the 13th article of the constitution of Texas; acts of Congress of 1845 and 1846, 17 Ib. 23, § 3.

See act of 14th January, 1843, Hartley's Digest, 649.

It is evident that the rights of individuals to real estate in Texas were based upon the constitution and laws of the republic. By virtue of these, lands were acquired and held. It is evident that the constitution and laws could at all times have been annulled by the same power that created them. Had this been done, then we contend that all private property would have reverted immediately to the general mass. For a distinguished author has truly said, "Property and laws are born together and die together. Before laws were made, there was no property; take away laws, and property ceases." J. Bentham's Theory of Legislation, 139. If the people of Texas would do this while they had an independent government, they could certainly do what was far less than this; namely, could say that certificates of this class sued on should be established in the mode prescribed in their constitution, or that they should never be established at all.

Mr. Justice GRIER delivered the opinion of the court.

A brief statement of the history of this case will be necessary to a correct apprehension of the points involved.

By the colonization laws of Mexico in force in the State of Texas before their revolution, every married man who became a settler or colonist was entitled to a square league of land. In 1835, when Texas declared her independence, the faith of the republic was pledged that all who would perform the duties of citizens should receive the benefit of this law; accordingly, in the constitution of the new republic, adopted on the 17th of March, 1836, it was provided, that all white persons "residing in Texas on the day of the declaration of independence should be considered citizens of the republic, and if they had not previously received land under the colonization laws should be entitled, every head of a family to one league and labor of land," &c.

In 1837, December 14th, an act of the Congress of Texas was passed, establishing a land-office, and authorizing the ap-

pointment of certain commissioners with power to grant certificates of claims to land to all persons who should make proof that they were entitled to them.

Immense numbers of these certificates were soon put in circulation, either forged or fraudulently obtained, which, if confirmed by surveys and patents, would soon have absorbed all the vacant land in the republic. To guard against such impositions, an act was passed on the 29th of January, 1840, entitled "An Act to detect fraudulent certificates," by which a new board of commissioners was appointed "to inspect the board of land commissioners of each county, and ascertain by satisfactory testimony what certificates were genuine and legal." All others not so reported were forbidden to be surveyed or patented. This was followed on the 4th of February, 1841, by a supplement, in which persons holding certificates not reported genuine and legal by the board of commissioners, were permitted to enter suit against the government, and have a trial by jury to establish the genuineness and validity of their certificates; and if found valid, and so certified by the court, the claimant should be entitled to a survey and patent.

In 1843, a statute of limitation was passed, requiring all suits to establish certificates and claims to be instituted before the 1st day of January, 1844.

Thus it appears that, after the 1st of January, 1844, all claimants of these head rights under the constitution of the republic and its land law of 1837 were barred, and their certificates of no validity whatever, unless suit has been brought and their genuineness established in a court of justice; and this continued to be the case, till the adoption of the new constitution, previous to the admission of Texas as a State of the Union, in 1845.

The eleventh article of that constitution provided as follows: —

"Sect. 1. All certificates for head right claims, issued to fictitious persons, or which were forged, and all locations and surveys thereon, are, and the same were, null and void from the beginning.

"Sect. 2. The District Courts shall be opened until the first day of July, one thousand eight hundred and forty-seven, for the establishment of certificates for head rights not recommended by the commissioners appointed under the act to detect fraudulent land certificates, and to provide for issuing patents to legal claimants; and the parties suing shall produce the like proof, and be subject to the requisitions, which were necessary, and were prescribed by law, to sustain the original applications for said certificates; and all certificates above re-

ferred to, not established or sued upon before the period limited, shall be barred, and the said certificates, and all locations and surveys thereon, shall be for ever null and void; and all re-locations made on such surveys shall not be disturbed until the certificates are established as above directed."

This is a succinct history of the legislation complained of by the plaintiff. He instituted this action in the District Court of the State of Texas for the county of Galveston. It is a bill or petition for a mandamus to the defendants (who are the surveyor and the deputy surveyor of the district), commanding them to make a survey of a certain certificate granted on the 20th of June, 1838, by the land commissioners of the county of San Augustine to Colin T. McRea, for one league and labor of land, &c. The plaintiff claimed to be the assignee of this certificate. The defendants alleged in their answer, that they were forbidden by law to survey this certificate, as it had not been returned as genuine and legal by the commissioners under the act of the 29th of January, 1840, nor had any suit been brought to establish its genuineness before the first day of July, 1847, according to the provisions of the constitution. The court refused to grant the mandamus; and on writ of error to the Supreme Court of Texas, their judgment was affirmed.

To the judgment of the Supreme Court of the State this writ of error has been prosecuted, under the twenty-fifth section of the Judiciary Act.

The sum of the argument on which the plaintiff founds his claim to our interference seems to be, that the republic of Texas was under obligation to make these grants of land. That all grants made by the land commissioners under the act of 1837 were in their nature judicial decisions, and, whether fair or fraudulent, their validity could never after be inquired into. That such certificate constituted a perfect right to the quantity of land awarded, and all legislation of the republic of Texas, appointing new tribunals to examine their genuineness and legality, or to limit the time within which the holder or assignee of a certificate may demand a survey and patent, is void, because it impairs the obligation of contracts; and the eleventh section of the constitution of the State of Texas is void for the same reason.

If it were necessary for this court to consider these arguments, it would be a sufficient answer to say,—

1st. That the certificates are not in the nature of judicial decisions vesting title in the holders, whether forged or fraudulent.

2d. If they were judicial decisions, a State may grant new trials, and make new tribunals of review in order to detect

fraudulent grants or reverse fraudulent judgments, without impairing the obligation of any contract.

3d. Judgments as well as grants obtained by fraud or collusion are void, and confer no vested title; and a State may justly require those who claim that their grants are not of this character to make proof of their genuineness in some proper tribunal before they can be entitled to a survey or patent under them, and may limit the time within which suits may be instituted. The United States have pursued this course with regard to French and Spanish grants, and it has never been alleged that they thereby impaired their contract (contained in the treaty) to protect valid grants.

4th. The eleventh article of the constitution of the State of Texas avoids none but forged and fraudulent certificates, and extends the time within which valid ones may be established by suits against the State, and therefore annuls no vested rights and impairs the obligation of no contract, but, on the contrary, confers a right which had been lost and forfeited by the laches of the party.

5th. And lastly, if the Congress of Texas had abolished all these certificates, whether fraudulent or genuine; or if the people of Texas had done the same thing by their constitution adopted before their admission as a State of the Union, their right to do so could not be questioned by this court, under any power conferred upon them by the twenty-fifth section of the Judiciary Act.

There is no allegation that the legislature of the State of Texas has passed any law impairing the obligation of contracts, or affecting vested titles guarantied by the treaty of union, since that State has been admitted as one of the States of this Union. The Constitution of the United States was made by, and for the protection of, the people of the United States. The restraints imposed by that instrument upon the legislative powers of the several States could affect them only after they became States of the Union, under the provisions of the Constitution, and had consented to be bound by it. It surely needs no argument to show that the validity of the legislation of a foreign state cannot be tested by the Constitution of the United States, or that the twenty-fifth section of the Judiciary Act confers no power on this court to annul their laws, however unjust or tyrannical. How far the people of the State of Texas are bound to acknowledge contracts or titles repudiated by the late republic, is a question to be decided by their own tribunals, and with which this court has no right to interfere under any power granted to them by the Constitution and acts of Congress.

The judgment of the Supreme Court of Texas is therefore affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Texas, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed, with costs.

JEHIEL BROOKS, PLAINTIFF IN ERROR, *v.* SAMUEL NORRIS.

Where a judgment was rendered on the 25th of October, 1843, and a writ of error allowed on the 19th of October, 1848, but not issued and filed until the 4th of November following, more than five years had elapsed after rendering the judgment, and the writ of error may be dismissed on motion.

It is the filing of the writ which removes the record from the inferior to the appellate court; and the day on which the writ may have been issued by the clerk, or the day on which it is tested, are not material in deciding the question.

By the English practice this error must be taken advantage of by plea; but according to the practice of this court, a party may avail himself, by motion, of any defect which appears upon the record itself.

THIS case was brought up from the Supreme Court of Louisiana, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

It appeared from the record that the judgment of the Supreme Court of Louisiana was rendered on the 25th of October, 1843.

The petition for the writ of error was addressed to the Honorable George Eustis, Chief Justice of the Supreme Court of the State of Louisiana. It was thus indorsed.

Order allowing Writ.

"A writ of error is allowed as prayed for, without prejudice. Security is required in the sum of five hundred dollars.

"GEORGE EUSTIS,
Chief Justice, Monroe, West District.

"*October* 19, 1848.

"Supreme Court, Alexandria.

"Filed November 4, 1848. M. R. ARIAIL, *Clerk.*"

Bond for Writ of Error.

"Supreme Court, State of Louisiana.

JEHIEL BROOKS *v.* SAMUEL NORRIS, in error.

"Know all men by these presents, that we, Jehiel Brooks, of the District of Columbia, and B. J. Sage, of New Orleans, Louisiana, are held and firmly bound unto the above-named Samuel Norris, in the sum of five hundred dollars, to be paid to the said Samuel Norris, his executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

"Sealed with our seals, and dated this 19th day of October, A. D. 1848.

"Whereas the above-named Jehiel Brooks hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the Supreme Court of the State of Louisiana.

"Now, therefore, the condition of this obligation is such, that if the above-named Jehiel Brooks shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

"B. J. SAGE, *for Jehiel Brooks.*
B. J. SAGE.

"Sealed and delivered, in the presence of
Test—JOHN RAY."

Approval of Bond.

"Personally appeared before me the above-named B. J. Sage and John Ray, who acknowledged their signatures to the foregoing bond, which is approved in the case of Brooks, plaintiff in error, *v.* Norris.

"GEORGE EUSTIS, *Chief Justice.*

"*Monroe, Oct.* 19, 1848."

Instructions.

"The clerk of the Supreme Court will only sign the writ of error in the event of its being sued out within five years from the date of the decree of the Supreme Court, in the case which it is taken.

"GEORGE EUSTIS, *Chief Justice.*

"Supreme Court, Alexandria.

"Filed November 4th, 1848. M. R. ARIAIL, *Clerk.*"

The writ of error bore the following teste:—

"Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court of the United States, this 4th day of November, A. D. 1848. M. R. ARIAIL,

Clerk of the Supreme Court of the State of Louisiana, at Alexandria."

"Copy of the writ of error lodged in the clerk's office of the Supreme Court of the State of Louisiana, at Alexandria, in pursuance of the statute in such cases made and provided, this 4th day of November, 1848. B. J. SAGE,

Attorney of Plaintiff in error.

"Supreme Court, Alexandria.

"Filed November 4th, 1848."

Mr. Bullard, for the defendant in error, moved the court to dismiss this writ of error, because the same was not brought within five years after the final judgment in the Supreme Court of the State of Louisiana.

Whereupon the court directed the motion to be set down for argument on that day week, viz. the 24th of January, and that the counsel give notice thereof to Mr. Walker, the counsel for the plaintiff in error.

On the 24th of January, the motion was argued by *Mr. Bullard* and *Mr. Walker*.

Mr. Bullard referred to the record, and cited the act of 1789, chap. 20, § 22, to show that the writ of error was not in time.

Mr. Walker referred to the prayer for the writ of error, which was allowed on the 13th of October, before the expiration of five years from the date of the judgment. The bond also was executed and approved on the same day. If necessary, he would move to amend the record under the act of 1789, as the error was merely one of form. The teste of the writ should be dated at the preceding term of this court, because, although issued in the name of the chief justice, it was always presumed to be issued by the authority of the court. He would move, therefore, to amend it by inserting the date of the preceding term, viz. December term, 1847. Filing does not mean issuing. Although the writ was not filed until the 4th of November, the record does not show that it was not issued before. Suppose, after the writ is allowed, the clerk refuses or neglects to issue it; will that deprive the party of his remedy? In 10 Wheat. 311, the appeal was allowed, but security not given within five years. He cited also 2 Pick. 592; 7 Cranch, 277; 3 Peters, 459.

The case was docketed in this court on the 23d of January,

1849. Therefore this is the third term, and it is now too late to make this motion. There has been a regular appearance entered, not merely a formal one, but the opposite counsel directed in writing that his appearance should be entered. Brooks might have brought a new action if he had not supposed this appeal to be pending. Millaudon *v.* McDonogh, 3 Howard, 707.

Mr. Bullard, in reply. When he directed his appearance to be entered, he did not know the state of the record. This is not a question of form, but one of jurisdiction. The cases cited are not analogous. In appeals there is no necessity for a writ from a higher court, and this was one of the cases cited. But in writs of error, the higher court must act. When a motion should be made to alter the teste, he would meet it. This action was a petitory action, and Brooks could not have brought another suit, as he could have done in an ejectment.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case is brought here by writ of error upon a judgment rendered in the Supreme Court of the State of Louisiana, and a motion has been made to dismiss the writ.

It appears by the record that the judgment was rendered on the 25th of October, 1843. The writ of error by which the case is brought here was allowed by the chief justice of the State court, upon the petition of the appellant, on the 19th of October, 1848, and the bond also bears date on that day. But the writ of error was not issued until the 4th of November following. It was issued by the clerk of the court in which the judgment was rendered, and on the same day, as appears by indorsement upon it, filed in that office by the counsel for the plaintiff in error. More than five years from the day of the judgment had therefore elapsed when this writ of error was filed.

The act of 1789, chap. 20, § 22, provides that writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of. The writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of Congress must be calculated accordingly. The day on which the writ may have been issued by the clerk; or the day on which it is tested, are not material in deciding the question.

In this case, therefore, five years had elapsed before the

writ of error was brought, and the limitation of time in the act of Congress was a bar to the writ. According to the English practice, the defendant in error must avail himself of this defence by plea. He cannot take advantage of it by motion: nor can the court judicially take notice of it, as the limitation of time is not an objection to the jurisdiction of the court. It is a defence which the defendant in error may or may not rely upon, as he himself thinks proper. But according to the established practice of this court he need not plead it, but may take advantage of it by motion. The forms of proceeding in the English courts of error have never been adopted or followed in this court. And either party, without any formal assignment of error or plea, may avail himself of any objection which appears upon the record itself. In this case the bar arising from the lapse of time is apparent on the record, and the defendant may take advantage of it by motion to quash or to dismiss the writ.

As this objection is conclusive, it is unnecessary to inquire whether the writ of error was allowed or issued by proper authority, or what previous defects may be cured by the appearance of the defendant in error. The writ must be dismissed, upon the ground that it is barred by the limitation of time prescribed by the act of Congress.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Louisiana, and on the motion of H. A. Bullard, Esquire, of counsel for the appellee, to dismiss this writ of error upon the ground that it is barred by the limitation of time prescribed by the act of Congress, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that this cause be, and the same is hereby, dismissed, with costs.

JOHN A. WARNER, A CITIZEN OF THE STATE OF PENNSYLVANIA; JOHN A. WARNER AND COMPANY, CITIZENS OF THE SAME STATE; AND WILLIAM HEALD, JACOB HEALD, RESIDING OUT OF THE JURISDICTION OF THE CIRCUIT COURT OF PENNSYLVANIA, SAMUEL WOODWARD, AND A. J. BUCKNER, CITIZENS OF THE SAME STATE, TRADING UNDER THE FIRM OF HEALD, WOODWARD, AND COMPANY, APPELLANTS, *v.* THOMAS P. MARTIN, A CITIZEN OF THE STATE OF VIRGINIA, WHO SURVIVED SPENCER FRANKLIN, ALSO A CITIZEN OF THE STATE OF VIRGINIA, LATELY TRADING UNDER THE FIRM OF MARTIN AND FRANKLIN.

Where a merchant, in order to secure himself from loss, took merchandise from a factor, with a knowledge that the factor was about to fail, the principal who consigned that merchandise to the factor may avoid the sale, and reclaim his goods, or hold the merchant accountable for them.

And where the purchase was made from the factor's clerk, who had been left by the factor in charge of the business, this was an additional reason for avoiding the sale; because a factor cannot delegate his authority without the assent of the principal.

A factor or agent, who has power to sell the produce of his principal, has no power to affect the property by tortiously pledging it as a security or satisfaction for a debt of his own, and it is of no consequence that the pledgee is ignorant of the factor's not being the owner. But if the factor has a lien upon the goods he may pledge them to the amount of his lien.

Under any of these irregular transfers, a court of equity will compel the holder to give an account of the property which he holds.

Nor can a factor sell the merchandise of his principal to a creditor of the factor in payment of an antecedent debt. Such a transfer is not a sale in the legal acceptation of that term.

The power of a factor explained.

These principles of the common law are sustained by a statute of the State of New York passed in April, 1830 (3 Revised Laws, Appendix, p. 111).

THIS was an appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania, sitting as a court of equity.

In the early part of the year 1841, there was a commercial firm in the city of Richmond, Virginia, trading under the name of Martin & Franklin, who were dealers in tobacco and manufacturers of the article. There was at the same time a firm in Philadelphia, composed of the persons named in the caption of this statement, trading under the name of Heald, Woodward, and Company. There was also a firm in New York, trading under the name of Charles Esenwein and Company, although consisting of Charles Esenwein alone; and in Philadelphia there was also a commercial house, known by the name of John A. Warner and Company, although consisting of John A. Warner alone.

To the house of Charles Esenwein and Company in New York, Martin & Franklin were in the habit of consigning manufactured tobacco for sale, as their agents and factors.

In April, 1841, Martin & Franklin opened a correspondence with Heald, Woodward, & Co., which resulted in the latter house becoming the agents of the former, for the purpose of selling their manufactured tobacco, in Philadelphia, as agents and factors.

In April, 1841, Martin & Franklin made the first shipment upon a new account to Charles Esenwein & Co., in New York, and continued, at intervals during the summer, to make more consignments. Their practice was, at each shipment, to draw a draft upon Esenwein & Co., payable in four months, for an estimated portion of the proceeds of sale. Amongst other drafts were the following, viz.: —

1841, May 27,	at four months,	due	September 30,	for	$	800.
" June 12,	"	"	" October 15,	"		700.
" July 3,	"	"	" November 6,	"		300.
" July 29,	"	"	" December 2,	"		850.

These drafts were not paid by Esenwein & Co. at maturity.

The tobacco shipped during the period when these drafts were drawn was the following, viz.: —

Statement of Tobacco received by Charles Esenwein & Co. from Messrs. Martin & Franklin, of Richmond, Va., to sell for their account.

1841.		Whole Boxes.	Half-Boxes.
May 12.	Received ex schooner Manchester:		
	36 whole boxes T. P. Martin's 8's lump,		
	34 do. do. do. 16's "		
	20 do. do. do. 32's "	90	
June 7.	Received ex schooner Lynchburg:		
	20 whole boxes T. P. Martin's long 12's lumps,		
	16 do. do. H. Wit & Son, 16's "		
	26 do. do. T. P. Martin's 16's "	62	
June 29.	Received ex schooner Manchester:		
	8 whole boxes T. P. Martin's 16's lump,		
	56 half do. do. 32's "	8	56
July 8.	Received ex schooner Leontine:		
	28 half-boxes T. P. Martin's 32's lumps, ...		28
Aug. 15.	Received ex schooner Weymouth:		
	2 whole and 76 half boxes T. P. Martin's 32's,	2	76
	Received in all, boxes	162	160

In August, 1841, Esenwein was in embarrassed circumstances, and sailed for Europe, leaving his business under the management of his clerk, Engelbert Caprano.

On the 3d of September, 1841, the house of Charles Esen-

wein & Co. failed. On the day before the failure, Esenwein & Co. were indebted, amongst other persons, to the firm of John A. Warner & Co. of Philadelphia, and Charles Conolly of New York. At some short time before the failure, Warner went to New York and got tobacco out of the store of Esenwein & Co., and in his account with that house the following entries appeared as credits to Esenwein & Co.:—

1841.			
Sept. 2.	By sundry notes, ...		$ 11,977.69
" 2.	sundries, ...		27,010.46
" 2.	sundries, ...		2,654.98
" 2.	S. Austin's note due Dec. 31 – 3 Jan. 1842,		435.47
" 2.	transfers of Loomis & Hale's account,		120.59
" 2.	do. J. M. Brineler's account,		203.00
" 2.	do. D. W. Warning's account,		796.85
" 2.	o. S. Mayer's account,		1,208.99
" 2.	do. J. Barber & Co.'s account,		494.15
" 2.	do. A. Snowhill & Son's account,		1,089.75
" 2.	do. A. Snowhill's account,		125.53
	Amount carried over,	$ 97,444.20	$ 95,871.77
	Amounts brought forward,	$ 97,444.20	$ 95,871.77
Sept. 2.	By cash received Aug. 14,		160.00
" 2.	To net proceeds of tobacco,	1,198.00	
" 2.	do. do. of cigars,	45.70	
" 2.	To difference in bill tobacco, Sept. 2, 1841, . . .	161.69	
" 2.	By balance, . . .		2,817.82
		$ 98,849.59	$ 98,849.59
1841.			
Sept. 2.	To balance, ...	$ 2,817.82	

When the failure took place, Caprano made an assignment to Charles Conolly, and among other things assigned seventeen whole boxes and twelve half-boxes of the tobacco which had been consigned by Martin & Franklin, that being the whole amount of their tobacco then on hand.

On the 6th of September, 1841, the following transaction occurred between John A. Warner & Co. and Heald, Woodward, & Co.

In the account between these two firms, Warner & Co. have a credit entered under date of September 6, as follows: — "Sept. 6. Sundries, $ 22,441.52."

This transaction is in part explained in the answer of Heald, Woodward, & Co.

"The defendants, now and at all times, saving all exceptions for further answer to said bill of complainants, say:

"That in the month of September, A. D. 1841, they purchased of John A. Warner, as before they have answered, a large quantity of goods, and, among other things, two hundred and fifty-eight boxes of tobacco, known by the name of Martin's tobacco, and no more; this being the whole number of boxes or half-boxes of tobacco either sold or delivered by said Warner to defendants about that time, branded with the names or initials of complainant, or at all answering the description in complainant's bill, or inquired about therein; that of said tobacco there was redelivered to said Warner before the filing of complainant's bill, or he failed to deliver, one hundred and thirty-four boxes, (as to which 134 boxes of tobacco, the said contract of sale between said Warner and these defendants was by mutual consent annulled and rescinded,) leaving in the hands of, or under the control of, these defendants, at the time of filing of said bill, only one hundred and twenty-four boxes or half-boxes of said tobacco, or the proceeds thereof, and which said one hundred and twenty-four boxes were branded with the name or initials of complainant, as defendants believe, though of this they have no certain knowledge. And these defendants purchased the said tobacco of said Warner about September 6th, 1841, at the following prices, to wit, one hundred and six boxes thereof of lumps 8's, 12's, 16's, being 13,676 pounds, at 12 cents per pound, viz. $1,640.12; and eighteen boxes lumps 32's, at 16 cents per pound, viz. $230.40; making together $1,870.52.

"And they further aver and repeat, that they purchased the same fairly and *bonâ fide* of said Warner, and for full value, and that they had no knowledge whatever at the time, that said tobacco or any part thereof belonged to complainant, nor had they any reason to believe or know it. And further, the defendants say that the price paid by them for said tobacco is truly set forth and alleged as above, and the same was received by them and sold by said Warner to be placed by them to the credit of his account, and in part payment of, and not as security for, a debt due these defendants by said Warner, and which debt is not yet fully paid."

On the return of Charles Esenwein from Europe, he obtained a reassignment from Conolly of the seventeen whole and twelve half boxes of tobacco which belonged to Martin & Franklin, sold them, and remitted the proceeds to that house in Richmond.

On the 13th of September, 1841, Martin & Franklin wrote to Heald, Woodward, & Co. the following letter:—

"*Richmond, Sept. 13th*, 1841.

"MESSRS. HEALD, WOODWARD, & Co., *Philadelphia.*

"Gentlemen, — I am just from New York, looking after our tobaccos that we had shipped on consignment to Charles Esenwein. Mr. E. Caprano, their clerk, that holds a power of attorney from Esenwein & Co., handed me a memorandum of tobacco sold; amongst those is John Warner & Co., of Philadelphia, 'sold them on the 2d of September, 250 boxes of our tobacco, 234 boxes branded Thomas P. Martin. and 16 boxes branded H. Wit & Son.'

"We have inclosed the memorandum; it is not signed; but Mr. Spear, of New York, will testify to the writing. His attorney informed one of us (Martin) that it was sold for cash, which is not likely, as the house failed on the next day; and we also observed in the assignment made in Philadelphia that Messrs. Warner & Co. are further secured in the first class made soon after. We wish to beg the favor of you to get the opinion for us of some able counsel, whether we can claim this tobacco, fraudulently taken from us under the cover of a cash sale, evidently to secure themselves at our loss. We had made drafts on them, of which about $2,000 has been paid, and they have sold about half that amount to other persons, for which they had heretofore charged a guaranty commission. Any expenses you may have to pay will be cheerfully allowed, by your obedient servants, MARTIN & FRANKLIN.

"N. B. We have omitted mentioning, in the event the attorney thinks as we do, you will set him about it at once, on our account, for which you will please be responsible for us.

"MARTIN & FRANKLIN."

To which letter they received the following answer: —

"*Philadelphia, Sept.* $15\frac{5}{6}$*th*, 1841.

"MESSRS. MARTIN & FRANKLIN.

"Gentlemen, — Your favor of the $13\frac{3}{5}$th inst. came duly to hand, and in reply thereto we proceed to give you information in relation to the tobacco sold by C. Esenwein & Co., of New York, to Messrs. Warner & Co. of this city.

"The latter house, we are told, loaned to Esenwein their notes and cash to the amount of $50,000, and something over; they were induced to make this loan in consequence of representations by Esenwein, that this amount would be sufficient to enable his house to meet all their liabilities until he could have time to get to Europe and remit home sufficient funds to return the loan. After Esenwein had left the United States, Mr. Warner was satisfied in his own mind that he had

been deceived by him, and in order to secure himself from ruin he proceeded to purchase a sufficient amount of property from the attorney left by Esenwein in charge of his business. We were pained to learn that you were among the sufferers, and that you will not in all probability be able to recover any portion of the tobacco which you state was sold to Mr. Warner, as we believe the whole matter was arranged under the advice of eminent counsel engaged by Mr. Warner both in New York and this city.

"We think, therefore, that any attempt made to recover the tobacco would be attended with great expense, and in the end prove fruitless.

"Very respectfully, your obedient servants,

"HEALD, WOODWARD, & Co."

In April, 1842, Martin & Franklin filed their bill in the Circuit Court of the United States for the Eastern District of Pennsylvania against Heald, Woodward, & Co. and Warner. They alleged the shipment of the tobacco to Esenwein & Co.; the drawing of the bills; that, with full knowledge of the insolvency of Esenwein & Co., Warner had obtained possession of the tobacco, knowing it to be the property of Martin & Franklin; that shortly afterwards he transferred the said tobacco to Heald, Woodward, & Co., who also knew that it belonged to the complainants; that at the time of this transfer, Heald, Woodward, & Co. were the agents and correspondents of Martin & Franklin, and, as such, bound to protect their interests; and that when the letter of the 16th of September was written, Heald, Woodward, & Co. had in their possession the tobacco which they knew to be the property of the complainants. The bill then prayed for an account, &c.

The answers first filed by the respondents were objected to as insufficient, and the exceptions sustained.

On the 1st of March, 1843, Warner filed a further answer. He alleged that his purchase of the tobacco from Esenwein & Co. was *bonâ fide*, and according to the usual course of dealings between them; that the departure of Esenwein was publicly known, and was for the purpose of obtaining a loan from his relatives in order to carry on his business; that he had never applied for the benefit of the insolvent law, but was then carrying on his business in New York; that he sold the tobacco to Heald, Woodward, & Co. in the usual course of the dealings which had long existed between them, and not for the payment of any preëxisting debt; and that all accounts between them were regularly balanced and settled from time to time.

Heald, Woodward, & Co., in their answer, denied all agency, except for the tobacco which had been specially consigned to their house.

On the 11th of April, 1843, the cause was referred to a master to take depositions, and a commission to take testimony was issued to New York. It is only necessary to give an extract from the deposition of Charles Conolly, a creditor of the firm of Esenwein & Co., and to whom the assignment was made which has been already spoken of.

He deposed as follows:—

"After Mr. Esenwein left New York, Mr. Warner made purchases of that house in that store; he got tobacco out of the store of Esenwein after Esenwein left, but I could not swear that that tobacco was there when Esenwein left New York for Europe. I do not recollect the marks or numbers of any parts or quantities of them; they were in boxes, in kegs, and in bales; it had, I presume, been shipped from Virginia to Mr. Esenwein. I have, since that occurred, heard him say whose brands they were; he mentioned various manufacturers, among the rest were Martin & Franklin; I don't recollect that he mentioned how much of it was Martin & Franklin's brand. Tobias Beehler was in New York at the time Warner got these goods. I did not see Mr. Warner getting them out; I saw Mr. Beehler getting them out. I can't say with certainty whose brands or marks were on the tobacco Beehler was assisting in getting out. On the day I saw Mr. Beehler helping to get out those goods, I did not see Mr. Warner in New York, and understood he had left that morning or the day before; they were not to my knowledge working night as well as day in getting out this tobacco; I presume I made a great many particular remarks on the subject of taking away that tobacco. I recollect making the remark that the proceedings were wrong; it was in the forenoon that I saw Beehler taking away the goods; I saw considerable quantities going out of the store; the whole appearance of the store was wrong, it was upside down, it was done in an unbusiness-like manner; in other words, things were taken out harum-scarum on the day succeeding the failure, or the next day after, and that I suppose occasioned the remark."

On the 25th of September, 1848, the Circuit Court pronounced the following decree:—

"This cause having been heard and debated before the judges, by counsel on both sides, on the 25th, 26th, 27th, and 28th of April last, upon the bill, answers, and proofs taken in the cause, the court do order and decree, that the defendants do pay to the complainant the sum of $2,869.14, with inter-

est from the 25th of September, 1848, this being the amount of such of the bills of exchange accepted by Esenwein & Co. upon the tobacco shipped to the said Esenwein & Co., as were paid by the complainant, together with the charges of protest and reëxchange by them incurred and borne by reason of the non-payment of such acceptances by said Esenwein & Co.; deducting therefrom the balance which would have been payable to Esenwein & Co. by the complainant, if the said acceptances had been paid by said Esenwein & Co.; interest being charged for and against the parties according to law.

"Per cur. R. C. GRIER,
J. K. KANE."

From this decree, an appeal brought the case up to this court.

It was argued by *Mr. Fallon*, for the appellants, and *Mr. Wharton*, for the appellee.

Much of the argument consisted in an examination of the facts in the case. The following points of law were then made.

The counsel for the appellants made the following points.

1st. That complainant had, on his own showing, a complete remedy at law, and that he is not entitled to the relief prayed for by him, in equity. Earl of Derby *v.* Duke of Athol, 1 Vesey, 205. Discovery may be granted, and yet relief refused. 1 Sim. & Stu. 519.

2d. That Charles Esenwein or his firm was a necessary party to the bill, and that the failure to make him such party is a fatal defect. Plunket *v.* Penson, 2 Atk. 51; 1 Paige, 215; Story's Eq. § 1526.

3d. That it was not too late to take advantage of these matters on the hearing. Story *v.* Livingston, 13 Peters, 375; Innes *v.* Jackson, 16 Vesey, 356; 1 Dan. Chancery Pr. 389, 390; Welford's Eq. Pleading, 414. At least so far as the bill prays for relief. 1 Maddock's Chan. 160, 174; 2 Vesey, 519. Russell *v.* Clark, 7 Cranch, 69; 1 Vesey, 205; Mitford's Chan. 225, 286; Mitchell *v.* Lenox, 2 Paige, 280.

4th. That the bill, answer, and proof fail to make out a case entitling the complainant to the relief prayed for.

5th. That the sale by Esenwein & Co. to Warner was perfectly valid as against complainant. Wright *v.* Campbell, 4 Burr. 2046; George *v.* Clagett, 7 Term Rep. 359; 2 Smith's Leading Cases, 77, and cases there cited; Urquhart *v.* McIver, 4 Johns. 103; De Lisle *v.* Priestman, 1 Browne's Rep. 176; Story on Bailments, 215–217.

6th. That the sale to Heald, Woodward, & Co. was perfectly valid as against complainant. Same cases as to fifth point are cited.

7th. That there is no evidence that Warner at the time of his purchase knew of the alleged ownership of complainant in the tobacco, and that the facts relied on by the court below as sufficient to put him on inquiry, are insufficient for that purpose.

8th. That the court were equally in error with regard to Heald, Woodward, & Co., as well as in saying that they had full knowledge of the true nature of the transaction by which Warner obtained possession of the goods, and that they had paid nothing for them till after notice of complainant's claim.

9th. That the court erred in assuming the four drafts on Esenwein & Co. as paid by complainant, as also in assuming that the tobacco consigned to Esenwein, and mentioned in the bill, corresponded with or formed part of that sold to Warner. 1 Smith's Chancery Pr., in notes.

10th. That in any event the acceptance of the drafts by Esenwein & Co. to an amount greater than the value of the tobacco, those drafts being outstanding, makes the sale by Esenwein perfectly valid as against complainant, and at least complainant cannot recover in this bill without showing that before filing it he had offered to do equity by tendering the drafts, having previously paid them. Daubigny *v.* Duval, 5 T. R. 604; Urquhart *v.* McIver, 4 Johns. 103; 6 Paige, 121, 122.

Mr. Wharton, for the appellee.

I. That a court of equity has jurisdiction. (The numerous authorities on this point are omitted.)

II. In reply to the objection that Esenwein ought to have been a party to the bill, Mr. Wharton contended, —

1. That Esenwein was not a necessary party.

The cases upon this subject are very numerous. It is probably sufficient to refer to the general rules laid down by elementary writers.

It is not an interest in the subject-matter of the suit, but in the object, that makes a party a necessary party. Calvert on Parties, 5, 6, 10, &c.; Story's Equity Pleading, § 72.

The objects of this suit were, — 1. Discovery; 2. Account; 3. Relief, in the restoration of the value of the property to the complainants. Now Esenwein was not a necessary party for either of these purposes.

Again, he was out of the jurisdiction of the court, and no decree was sought against him. Story, §§ 79, 80, 81, &c.; Joy *v.* Wirtz, 1 Wash. C. C. 517.

If a decree can be made without affecting the rights of a person not made a party, or without his having any thing to perform necessary to the perfection of the decree, the court will proceed without him, if he is not amenable to their process, or no beneficial purpose is to be effected by making him a party. Bailey *v.* Inglee, 2 Paige, 278; Mallow *v.* Hinde, 12 Wheaton, 193; Russell *v.* Clark, 7 Cranch, 96; Cameron *v.* M'Roberts, 3 Wheaton, 591.

Esenwein was, on his return to this country, examined as a witness by the complainant, and cross-examined by the defendants, who, it is submitted, thereby waived any exception, on the score of his not being a party.

2. The objection was at all events too late. Story *v.* Livingston, 13 Peters, 375; Robinson *v.* Smith, 3 Paige, 222; Watertown *v.* Cowen, 4 Paige, 510; Alderson *v.* Harvey, 12 Alabama, 580.

The 47th, 51st, 52d, and 53d Rules of Practice for the Courts of Equity of the United States were also referred to.

III. It is submitted that, upon the merits, the defendants have no case for the favorable consideration of a court of equity.

It was not denied that the complainant was the owner of two hundred and fifty-six boxes of tobacco, and that Warner got possession of them and delivered them to Heald, Woodward, & Co.

The points presented by the defendant's answer, and argued for them on the hearing, in reply to this *primâ facie* case, were, —

That Warner purchased this tobacco for a valuable consideration of a person who appeared to be the owner, and therefore had a right to retain it, and to transfer the property to Heald, Woodward, & Co.

In reply to this, it is contended, —

1st. That this was not a purchase for a valuable consideration, by a stranger, on the faith of ownership in the vendor.

2d. That before the factor's acts, such a transaction would not have conferred a title to the property on the defendants.

3d. That the factor's acts do not protect the defendants.

4th. That Heald, Woodward, & Co., being the agents of the complainant, could not acquire title to the property of their principal, to the prejudice of the latter.

1st. This point was established by an examination of the answers, exhibits, and evidence.

2d. The authorities cited upon this point were the following. Russell on Factors, &c. 56, 139; 2 Kent's Comm. 622, 623; Guerrero *v.* Peile, 3 Barn. & Ald. 616; Shipley *v.* Kymer, 1

Maule & Selw. 484; Howard *v.* Chapman, 4 C. & P. 508; Hudson *v.* Granger, 5 Barn. & Ald. 27, 33; Sims *v.* Bond, 5 Barn. & Adolph. 389, 393; Moore *v.* Clementson, 2 Campb. 22; Russell on Factors, p. 116, Part III.; Fielding *v.* Kymer, 2 Brod. & Bingh. 639; Story on Agency, § 113 and note, §§ 225, 486; Paley on Agency, by Lloyd, 340, 341, 342; De Bouchout *v.* Goldsmith, 5 Ves. 211, 213; Van Amringe *v.* Peabody, 1 Mason, 440; Petrie *v.* Clark, 11 Serg. & Rawle, 388; Paley on Agency, 330; Escot *v.* Milward, 7 Term Rep. 361 (b); Warner *v.* M'Coy, 1 Meeson & Welsby, 591; Baring *v.* Corrie, 2 Barn. & Ald. 137; Newson *v.* Thornton, 6 East, 17, 43; Parker *v.* Donaldson, 2 Watts & Serg. 21; 2 Smith's Leading Cases, 79, note; Graham *v.* Dyster, 6 Maule & Selw. 1, 4; Story on Agency, § 407 *et seq.*

3d. The causes and objects of the British statutes, and of the acts of our own legislatures, in respect to factors, will be found fully set forth and explained in the following-named works. Paley on Agency, by Lloyd, p. 222, &c., and Appendix, No. 1. &c.; Russell on Factors, &c., p. 122, &c.; Story on Agency, § 113, and note (5) thereto; in which note, however, the provision of the statute 6 Geo. 4, ch. 94, respecting pledges for preëxisting debts, is not stated with sufficient precision.

The act of New York upon this point was passed in 1830, and is contained in the third volume of Revised Laws, Appendix, p. 111.

The act of Pennsylvania upon this point was passed in 1834, and will be found in Purdon's Digest, p. 486 (ed. 1847).

Upon the construction of these acts, the following cases were cited. Russell on Factors, 132, &c.; Taylor *v.* Truman, 1 Mood. & Malk. 453; Taylor *v.* Kymer, 3 Barn. & Ad. 320; Fletcher *v.* Heath, 7 Barn. & Cres. 517, 524; Blandy *v.* Allen, 3 Car. & Payne, 447; Russell on Factors, 139, 145, 147; Evans *v.* Truman, 1 Mood. & Rob. 10; Stevens *v.* Wilson, 6 Hill, 512; Stevens *v.* Wilson, 3 Denio, 472; Pringle *v.* Phillips, 1 Sandf. Sup. Ct. 292; Hadwin *v.* Fisk, 1 La. Ann. Rep. 74.

Then as to Heald, Woodward, & Co. It was contended that they stand in no better situation than Warner, but in some respects are in a worse position.

1st. If Warner did not acquire a title to the tobacco of the complainant, he could not transfer a title to Heald, Woodward, & Co.

2d. Even if a purchaser *bonâ fide*, for a valuable consideration paid, would be protected, yet Heald, Woodward, & Co. were not such purchasers.

3d. Being at the time agents of the complainant, they were

disabled from purchasing, or in any way holding the property of their principal by an adverse title.

In reference to which points, the following authorities were cited. Story on Agency, p. 207, § 217, and the cases there stated; Bartholomew *v.* Leech, 7 Watts, 472, 474; Veil *v.* Mitchell, 4 Wash. C. C. 105, 106; Story on Agency, § 478.

Plea of purchase for a valuable consideration must aver actual payment before notice. It is not enough that the money was secured to be paid. Mitford's Pleadings, 338; Beames's Pleadings, 245, 246, 247; Story's Eq. Pleading, 464, 623, § 649, 810, &c.

Mr. Justice WAYNE delivered the opinion of the court.

We state such circumstances in this case as may be necessary for the application of our opinion to other cases of a like kind.

Martin & Franklin were manufacturers of tobacco in Richmond, Virginia. They were in the habit of shipping the article to Charles Esenwein in New York, as their agent and factor. In April, 1841, they made the first shipment upon a new account to Esenwein, and at intervals during the summer made other consignments to him. It was their practice to draw upon Esenwein, payable in four months, for an estimated portion of the proceeds of sale; among other drafts were the following: —

1841,	May 27,	at four	months,	due	Sept. 30,	for	$ 800.
"	June 12,	"	"	"	Oct. 15	"	700.
"	July 3,	"	"	"	Nov. 6,	"	300.
"	July 29,	"	"	"	Dec. 2,	"	850.

These drafts were not paid by Esenwein. The consignments during the period when the drafts were drawn were one hundred and sixty-two half, and one hundred and sixty whole boxes of tobacco. Esenwein's entry of the consignment is, "Statement of tobacco received by Charles Esenwein & Co. from Messrs. Martin & Franklin of Richmond, Virginia, to sell for their account."

The business relation between them in this transaction was that of principal and factor, unaffected by any particular instructions from the principals, or by any right or power acquired by the factor, beyond his general commission to sell the tobacco, according to the usages of trade in the place to which it had been sent for sale.

In August, 1841, Esenwein became embarrassed and sailed for Europe. He left his business under the management of his clerk, Engelbert Caprano. On the 3d of September Esen-

wein failed. Among his creditors was John A. Warner of Philadelphia. A short time before the failure, Mr. Warner, between whom and Esenwein there had been much previous dealing, went to New York. He then obtained from Caprano, the clerk, from the store of Esenwein, a quantity of tobacco, cigars, and other merchandise. The proof in the case is, that the tobacco was a part of the consignments which had been made within the dates before mentioned by Martin & Franklin to Esenwein. Warner says in his answer to the bill of the complainant, that the same was purchased by him for a full consideration and price, in like manner as he had frequently purchased from Esenwein; and that he did not know that the tobacco belonged to Martin & Franklin. But he admits, "the insolvency of Esenwein was believed." In his amended answer he says, he purchased the tobacco *bonâ fide*, in manner as had been before stated by him. That it was paid for after the purchase, by his paying and adjusting thirty thousand dollars of his own notes, which he had loaned to Esenwein, by his paying and redeeming them. Subsequently, in three days after Esenwein's failure, Heald, Woodward, & Co. of Philadelphia bought from Warner two hundred and fifty-eight boxes of tobacco, known as Martin's tobacco. The proof in the case is, that it was a part of that which Warner had obtained from Esenwein's clerk, which had been consigned to Esenwein by Martin & Franklin, as already stated. They aver, and there is no reason or cause to doubt it, that they purchased from Warner fairly, and for full value; that they had no knowledge whatever at the time, that the tobacco or any part of it belonged to the complainants; nor had they any reason to believe or know it. Their contract, however, with Warner, was rescinded in part. They received from him only one hundred and twenty-four boxes, instead of the two hundred and fifty-eight which had been sold to them.

From some other dealing between Heald, Woodward, & Co. and Martin & Franklin, the latter have drawn an inference of an agency of the former for them in this transaction. We think there was no such agency. At the same time we will say, that there was an unbecoming and apprehensive reserve in their reply to the letter of Martin & Franklin, making inquiries concerning their tobacco, which Warner had received from the clerk of Esenwein, a part of which Heald, Woodward, & Co. had bought from Warner and was then in their possession. It was, however, not a concealment, from which it can be inferred that Heald, Woodward, & Co. meant to commit either a legal or moral fraud upon their correspondent. It appears that they had nothing to do with the transfer of the

tobacco to Warner, nor any other than a fair connection with him in the sale of it by Warner to them.

From this statement, we have no doubt of the law of the case. It may be applied, too, without any imputation upon the integrity of either of the parties concerned. The defendants have misapprehended the principles which govern the rights of themselves and the plaintiff; but there is nothing in their proceedings which impairs mercantile character. They have been much mistaken, without meaning premeditated unfairness. If some temper had not been thrown into the case at first, there probably would not have been any charge of fraudulent intention. No one will be surprised from the proceedings in the cause, and the argument made upon it in this court, that its merits were lost sight of, in the effort made on the one side to establish fraud, and on the other to resist it.

The exact questions raised by the record are, whether or not the transfer of the tobacco to Warner divested the plaintiff's ownership of it; and whether or not Warner's sale of a part of it to Heald, Woodward, & Co., for a full consideration, without any knowledge upon their part of the plaintiff's interest when they bought from Warner, gave to them a property in it.

Warner's account of dealings with Esenwein we believe to be true. In his answer, however, he puts his right to retain the tobacco upon a footing not applicable to it. He says he bought without knowing that Martin & Franklin had any interest in the tobacco, and that he believed Esenwein was the owner. His inference practically was, that he might therefore set off against the price his liability for the notes which he had lent to Esenwein as a debt due by Esenwein to him. This can only be done upon the principle that, where two persons equally innocent are prejudiced by the deceit of a third, the person who has put trust and confidence in the deceiver should be the loser. He discloses in his answer his knowledge of a fact which takes him out of any such relation to the plaintiff. It is his knowledge, at the time of the delivery of the tobacco to him, of the failure of Esenwein.

In all of those cases in which it has been ruled that the buyer who, at the time of the sale, knows nothing of the relation between the factor with whom he deals and the principal by whom that factor has been employed, is protected by the law, in case of a misadventure occurring by the default of the factor, it is admitted that the risk which a principal runs, through the inadvertence or misconduct of his agent, may be avoided, by the purchaser having notice, at any time before the completion of the purchase or delivery of the goods, of the

agent's commission. Peake, 177. Among the instances which the law terms notice enough for such a purpose is the insolvency of the factor known to the buyer. Eastcott *v.* Milward, 7 Term Rep. 361; Ibid. 366. Warner says in his answer, that, at the time he made his purchase, "the insolvency of Esenwein was believed." Those are his words, and according to all that class of cases asserting the principle under which his answer puts him, such knowledge was sufficient to entitle the plaintiff to avoid the sale.

Again, a transfer to him, by way of sale, by the clerk of Esenwein, of property trusted to the latter as a factor, could not pass the title or right in it from the real owner.

It made no difference, that Caprano had been left to transact Esenwein's business whilst he was in Europe. A factor cannot delegate his trust to his clerk. The law upon this point is well settled. It has been repeatedly ruled. The first example in the first paragraph of Paley on Agency, upon the "execution of authority," is, if an agent be appointed to sell, he cannot depute the power to a clerk or under agent, notwithstanding any usage of trade, unless by express assent of the principal.

The utmost relaxation of the rule, *Potestas delegata non potest delegare*, in respect to mercantile persons, is, that a consignee or agent for the sale of merchandise may employ a broker for the purpose, when such is the usual course of business. Trueman *v.* Loder, 11 Adolph. & Ell. 589. Or where the usual course of the management of the principal's concerns in the employment of a sub-agent has been pursued for a length of time, and been recognized by the owners of property, they will be taken to have adopted the acts of the sub-agent as the acts of the agent himself. Blore *v.* Sutton, 3 Meriv. 237; Combes's case, 9 Co. 75–77; Roll. Abr. 330; Palliser *v.* Ord, Bunb. 166. Lord Eldon, in Coles *v.* Trecothick, 9 Ves. jr. 236, reprobates the notion, that, if an auctioneer is authorized to sell, all his clerks are, during his absence, in consequence of any such usage in that business. It was ruled by the Master of the Rolls in Blore *v.* Sutton, 3 Meriv. 237, that an agreement for a lease, evidenced only by a memorandum in writing, entered in the book of an authorized agent, signed by his clerk and not by the agent himself, was not a sufficient agreement in writing, it not being signed by an agent properly authorized, notwithstanding the entry was shown in evidence to have been approved by, and that it was made under the immediate direction of, the authorized agent, and in the usual course of the business of his office. A factor cannot delegate his employment to another, so as to raise a privity between that other and his principal. Solly *v.* Rathbone, 2 Maule & Selw. 299; Cock-

ran *v.* Irlam, Ibid. 301. The reason of the rule in all these mercantile agencies is, that it is a trust and confidence reposed in the ability and integrity of the person authorized. An agent ordinarily, and without express authority, or a fair presumption of one, growing out of the particular transaction or the usage of trade, has not the power to employ a sub-agent to do the business, without the knowledge or consent of his principal. The agency is a personal trust for a ministerial purpose, and cannot be delegated; for the principal employs the agent from the opinion he has of his personal skill and integrity, and the latter has no right to turn his principal over to another, of whom he knows nothing. 2 Kent's Comm. 633. No usage of trade anywhere permits a factor to delegate to his clerk the commission trusted to himself. In this case, there was a transfer of the plaintiffs' property to Warner, by a clerk of their factor. He knew when it was done that he was giving their property to a creditor of his employer in payment of his debt; and both himself and the purchaser knew that Esenwein was in failing circumstances, or, as Warner expresses it, "that his insolvency was believed." It must be admitted that such a transfer passed no property in the thing transferred, and that it may be reclaimed by the owner, as well from any person to whom it has been sold by the first buyer as from himself. It is the case of property tortiously taken from the owner or his agent, without any fault of the owner, and as such cannot take away his right to it.

On either of the grounds already mentioned, the plaintiff would be entitled to recover from the defendants in this case. But there is a third, which shall be stated in connection with other points respecting principals and factors, which it will not be out of place to notice. A factor or agent who has power to sell the produce of his principal has no power to affect the property by tortiously pledging it as a security or satisfaction for a debt of his own, and it is of no consequence that the pledgee is ignorant of the factor's not being the owner. Paterson *v.* Tash, Str. 1178; Maans *v.* Henderson, 1 East, 337; Newson *v.* Thornton, 6 East, 17; 2 Smith, 207; McCombie *v.* Davies, 6 East, 538; 7 East, 5; Daubigny *v.* Duval, 5 T. R. 604; 1 Maule & Selw. 140, 147; 2 Stark. 539; Guichard *v.* Morgan, 4 Moore, 36; 2 Brod. & Bingh. 639; 2 Ves. jr. 213. When goods are so pledged or disposed of, the principal may recover them back by an action of trover against the pawnee, without tendering to the factor what may be due to him, and without any tender to the pawnee of the sum for which the goods were pledged (Daubigney *v.* Duval, 5 T. R. 604); or without any demand of such goods (6 East, 538; 12 Mod.

514); and it is no excuse that the pawnee was wholly ignorant that he who held the goods held them as a mere agent or factor (Martini *v.* Coles, 1 Maule & Selw. 140), unless, indeed, where the principal has held forth the agent as the principal (6 Maule & Selw. 147). But a factor who has a lien on the goods of his principal may deliver them over to a third person, as a security to the extent of his lien, and may appoint such person to keep possession of the goods for him. In that case, the principal must tender the amount of the lien due to the factor, before he can be entitled to recover back the goods so pledged. Hartop *v.* Hoare, Str. 1187; Daubigny *v.* Duval, 5 T. R. 604; 6 East, 538; 7 East, 5; 3 Chitty's Com. Law, 193. So a sale upon credit, instead of being for ready money, under a general authority to sell, and in a trade where the usage is to sell for ready money only, creates no contract between the owner and the buyer, and the thing sold may be recovered in an action of trover. Paley, Principal and Agent, 109; 12 Mod. 514. Under any of these irregular transfers, courts of equity (as is now being done in this case) will compel the holder to give an account of the property he holds.

But it was said, though a factor may not pledge the merchandise of his principal as a security for his debt, he may sell to his creditor in payment of an antecedent debt. No case can be found affirming such a doctrine. It is a misconception, arising from the misapplication of correct principles to a case not belonging to any one of them. The power of the factor to make such a sale, and the right of the creditor to retain the property, has been erroneously put upon its being the usual course of business between factors to make a set-off of balances as they may exist in favor of one or the other of them against the price of subsequent purchases in their dealings. The difference between such a practice and a sale for an antecedent debt must be obvious to every one when it is stated. In the one, the mutual dealing between mercantile persons who buy and sell on their own account, and who also sell upon commission for others, is according to the well-known usage of trade. Its convenience requires that such a practice shall be permitted. But it must be remembered it is an allowance for the convenience of trade, and for a readier settlement of accounts between factors for their purchases from each other in that character. It does not, however, in any instance, bind a principal in the transfer of merchandise, if there has been a departure from the usages of trade, or a violation of any principle regulating the obligations and rights of principal and factor.

Again, it has been supposed that the right of a factor to sell the merchandise of his principal to his own creditor, in payment

of an antecedent debt, finds its sanction in the fact of the creditor's belief that his debtor is the owner of the merchandise, and his ignorance that it belongs to another; and if in the last he has been deceived, that the person by whom the delinquent factor has been trusted shall be the loser. The principle does not cover the case. When a contract is proposed between factors, or between a factor and any other creditor, to pass property for an antecedent debt, it is not a sale in the legal sense of that word or in any sense in which it is used in reference to the commission which a factor has to sell. See Berry *v.* Williamson, 8 Howard, 495. It is not according to the usage of trade. It is a naked transfer of property in payment of a debt. Money, it is true, is the consideration of such a transfer, but no money passes between the contracting parties. The creditor pays none, and when the debtor has given to him the property of another in release of his obligation, their relation has only been changed by his violation of an agency which society in its business relations cannot do without, which every man has a right to use, and which every person undertaking it promises to discharge with unbroken fidelity. When such a transfer of property is made by a factor for his debt, it is a departure from the usage of trade, known as well by the creditor as it is by the factor. It is more; it is the violation of all that a factor contracts to do with the property of his principal. It has been given to him to sell. He may sell for cash, or he may do so upon credit, as may be the usage of trade. A transfer for an antecedent, debt is not doing one thing or the other. Both creditor and debtor know it to be neither. That their dealing for such a purpose will be a transaction out of the usage of the business of a factor. It does not matter that the creditor may not know, when he takes the property, that the factor's principal owns it; that he believed it to be the factor's in good faith. His dealing with his debtor is an attempt between them to have the latter's debt paid by the accord and satisfaction of the common law. That is, when, instead of a sale for a price, a thing is given by the debtor to the creditor in payment, in which we all know that, if the thing given is the property of another, there will be no satisfaction. It is the *dation en payement* of the civil law as it prevails in Louisiana, which is, when a debtor gives, and the creditor receives, instead of money, a movable or immovable thing in satisfaction of the debt.

Courts of law and courts of equity, in a proper case before either, will look at such a transaction as one in which both principal and creditor have been deceived by the factor, so far as the deceit is concerned; but it will also be remembered in favor of the principal, that the creditor has acquired the prin-

cipal's property from his factor, with the creditor's knowledge, out of the usual course of trade, and will reinstate him in his former relation to his debtor, rather than that the creditor should be permitted to keep the property of another, who is altogether without fault, in payment of his debt. As to a factor's power to bind his principal by a disposition of his goods, the common law rule is, "that, to acquire a good title to the employer's property by purchasing it from his agent, such purchase must have been, either in market overt and without knowledge of the seller's representative capacity, or from an agent acting according to his instructions, or from one acting in the usual course of his employment, and whom the buyer did not know to be transgressing his instructions," or that he had not such notice as the law deems equivalent to raise that presumption. "The reason of this is clear, for unless the transaction took place *bonâ fide* in a market overt, (in which case a peculiar rule of law in England steps in for its protection,) an agent selling without express authority must, that his acts may be supported, have sold under an implied one. But an implied one thereby always empowers the person authorized to act in the usual course of his employment; consequently, if he sells in an unusual mode, he could have no implied authority to support his act, and, as he had no express one, his sale of course falls to the ground." Smith's Mercantile Law, 111, 112.

The defendants are not within the compendious summary just stated. There has been a transfer of property, which was consigned to a factor for sale, by his clerk, to a creditor of his employer, who knew his debtor to be in failing circumstances, just as well as the clerk himself did; and of property, too, which the clerk knew to be the property of the plaintiff, and which the creditor bargained for knowingly out of the usual course of trade. Nor should we omit to say, that Esenwein's opinion and disapproval of what had been done by his clerk with his principal's tobacco are significantly disclosed by the fact, that, upon his return from Europe, he redeemed so much of it as had been assigned to Mr. Conolly by his clerk in payment of a debt, and sold and remitted the proceeds to his principals.

By the common law, the transfer of the plaintiff's tobacco to Warner cannot be maintained. He is responsible to them for the value of so much of it as was not transferred by him to Heald, Woodward, & Co. Heald, Woodward, & Co. are responsible for so much of it as Warner transferred to them, because Warner, having no property in it, could not convey any to them. But Warner is answerable to them for that amount, and he is replaced for the whole as a creditor of Esenwein, just as he was before the transaction occurred.

The application of these principles of the common law to these parties, if it needed confirmation, would receive it from the statute of New York of April, 1830, for the amendment of the law relative to principals and factors or agents. The transfer to Warner was a New York transaction. The third section of that act very distinctly provides for those cases when the ownership, by the factor, of goods which he contracts to sell, shall be said to exist, to give protection to purchasers against any claim of the factor's principal. It is when he contracts for any money advanced, or for any negotiable instrument or other obligation in writing given for merchandise, upon the faith that the factor is the owner of it. The concluding words of the section are, "given by such other person upon the faith thereof." Three misconstructions of that act have been prevalent, but they have been corrected by the courts of New York. We concur with them fully. One was, that the statute altered the common law, so as to give validity to a sale made by the factor for an antecedent debt due by him to the person with whom he contracts; another, that the statute gave to a purchaser protection, whether he knew or not that the goods which the factor contracted to sell him were not the factor's, and belonged to his principal; and the other, that the concluding words, "upon the faith thereof," related to the advance made upon the goods, and not to the property which the factor had in them. Similar misconceptions were prevalent, and perhaps still prevail, concerning the corresponding section in the English factor's act, Geo. 4, ch. 94, 1825. The alterations of the common law, in this particular, by the English and the New York statutes, were suggested by practical and experienced merchants in both countries, to meet the exigencies of internal trade and its extension between nations. They are believed by their operation to be improvements in the law merchant. It may be owing to a misapprehension of those acts, that the defendants denied to the plaintiffs their rights. Fortunately the law secures them, and the case settled now as it is may prevent other controversies like it.

We shall direct the decree of the Circuit Court to be affirmed; and also order a decree to be entered against the defendants, that each of them shall pay to the plaintiffs the value of the tobacco which the defendants respectively retained, with interest upon the same as from the dates of the transfers of it to them.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern

District of Pennsylvania, and was argued by counsel. On consideration whereof, it is the opinion of this court, that there is no error in the decree of the said Circuit Court, "that the defendants do pay to the complainants the sum of $2,869.14, with interest from the 25th of September, 1848," and that the same should be affirmed, with costs; and that the complainants are entitled to recover from Warner & Co. $1,376.92½ (part of the aforesaid sum of $2,869.14) with interest thereon from the 25th of September, 1848, together with $ on account of the costs of the complainants in this court, and to have execution against them for the said several sums, amounting to $; and also that the said complainants are entitled to recover from the said Heald, Woodward, & Co. $1,492.21½ (the residue of the said sum of $2,869.14) with interest thereon from the 25th of September, 1848, together with $ in full of the balance of the costs of the complainants in this court, and to have execution against them for the said several sums, amounting to $ Whereupon it is now here ordered, adjudged, and decreed by this court, that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to enter a decree in conformity to the opinion of this court, and to proceed therein accordingly.

LOFTIN COTTON, PLAINTIFF IN ERROR, v. THE UNITED STATES.

The United States have a right to bring an action of trespass *quare clausum fregit* against a person for cutting and carrying away trees from the public lands.

THIS case was brought up, by writ of error, from the District Court of the United States for the Northern District of Florida.

It was an action of trespass *quare clausum fregit*, brought by the United States, for cutting trees upon the public lands, commenced in the Superior Court of West Florida in 1844, to which the defendant pleaded not guilty on the 26th of March, 1845. The cause remained pending in said court until the 15th of January, 1848, when, in pursuance of the act of the 22d of February, 1847, ch. 17, § 8, it was transferred to the United States District Court for the Northern District of Florida, and was ordered to stand for trial at the ensuing March term.

At that term the defendant appeared, and on leave filed a

demurrer to the declaration, which, after argument, was overruled, and the cause set down for trial on the plea of not guilty.

The cause having come on, the defendant requested the court to charge the jury,—

1st. That the only remedy for the United States for cutting pine timber on the public lands was by indictment.

2d. That the United States have no common law remedy for private wrongs.

3d. That the right of the United States to bring this action must be derived either from an act of Congress or from the law of some State in which the contract was made by which it acquired the property on which this trespass is alleged to have been committed.

4th. These lands were acquired by treaty from Spain, and that the United States has no common law remedy for trespass committed thereon. And that, Congress not having authorized the exercise of this remedy, the plaintiff ought not to recover any damages.

Which charge the court refused to give; whereupon the defendant excepted.

The jury found the defendant guilty of the trespass, and assessed the damages of the United States at $362.50, for which amount, and $122.22 costs, judgment was entered up. A motion in arrest of judgment was overruled.

The Supreme Court having, at the last term, decided that it had jurisdiction in cases like this, under the act of the 27th of February, 1847, without reference to the amount in controversy, the case now came before the court on the points raised by the bill of exceptions. 9 How. 579.

It was argued by *Mr. Walker*, for the plaintiff in error, and *Mr. Crittenden* (Attorney-General), for the United States.

Mr. Crittenden.

For the proper understanding of the points in the case, it is necessary to call the attention of the court to the act of the 2d of March, 1831 (4 Statutes at Large, 472), which was before it at the last term in the case of The United States *v.* Briggs, 9 Howard, 351, in which it was decided, that the cutting or procuring to be cut, removing or procuring to be removed, or aiding, or assisting, or being employed in the cutting of all descriptions of timber trees on the public lands, is an indictable offence under the said act, and punishable by fine and imprisonment.

No defence arising out of the passing of this act was pleaded either by way of abatement or specially.

The United States have the same right as any other proprietor to sue for trespasses on the public lands, and that right is not merged or lost by such trespasses having been made an offence punishable by indictment under the act of 1831. Dugan *v.* United States, 3 Wheat. 181; United States *v.* Gear, 3 Howard, 121; Manro *v.* Almeida, 10 Wheat. 494; Cross *v.* Gurthrie, 2 Root, Con. R. 90; Smith *v.* Weaver, 1 Taylor, 58; Blassingame *v.* Glaves, 6 B. Monroe, 38; Foster *v.* The Commonwealth, 8 Watts & Serg. 77.

Mr. Justice GRIER delivered the opinion of the court.

This is an action of trespass *quare clausum fregit* brought by the United States against Loftin Cotton, in which he is charged with cutting and carrying away a large number of pine and juniper trees from the lands of plaintiff.

On the trial below, the counsel for defendant requested the court to instruct the jury, 1st. "That the only remedy for the United States for cutting pine timber on the public lands was by indictment." 2d. "That the United States have no common law remedy for private wrongs." The refusal by the court to give these instructions is now alleged as error.

Every sovereign State is of necessity a body politic, or artificial person, and as such capable of making contracts and holding property, both real and personal. It is true, that, in consequence of the peculiar distribution of the powers of government between the States and the United States, offences against the latter, as a sovereign, are those only which are defined by statute, while what are called common law offences are the subjects of punishment only by the States and Territories within whose jurisdiction they are committed. But the powers of the United States as a sovereign, dealing with offenders against their laws, must not be confounded with their rights as a body politic. It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection. The restraints of the Constitution upon their sovereign powers cannot affect their civil rights. Although as a sovereign the United States may not be sued, yet as a corporation or body politic they may bring suits to enforce their contracts and protect their property, in the State courts, or in their own tribunals administering the same laws. As an owner of property in almost every State of the Union, they have the same right to have it protected by the local laws that other persons have. As was said by this court in Dugan *v.* United States, 3 Wheat. 181, "It would be strange to deny them a right which is secured to

every citizen of the United States." In the United States *v.* The Bank of the Metropolis, 15 Peters, 392, it was decided that when the United States, by their authorized agents, become a party to negotiable paper, they have all the rights and incur all the responsibilities of other persons who are parties to such instruments. In the United States *v.* Gear, 3 Howard, 120, the right of the United States to maintain an action of trespass for taking ore from their lead mines was not questioned.

Many trespasses are also public offences, by common law, or are made so by statute. But the punishment of the public offence is no bar to the remedy for the private injury. The fact, therefore, that the defendant in this case might have been punished by indictment as for a public offence, is no defence against the present action. Whether, if he had actually been indicted and amerced for this trespass in a criminal prosecution in the name of the United States, such conviction and fine could be pleaded in bar to a civil action by the same plaintiff, is a question not before us in this case, and is therefore not decided.

The judgment of the District Court is therefore affirmed.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Florida, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, with damages at the rate of six per centum per annum.

RICHARD C. STOCKTON, APPELLANT, *v.* JAMES C. FORD.

Where there was a judgment which had been recorded under the laws of Louisiana, and thus made equivalent to a mortgage upon the property of the debtor, and the plaintiff assigned this judgment, and was then himself sued and had an execution issued against him, his rights under the recorded judgment could not be sold under this execution, because he had previously transferred all those rights.

It was not necessary for an assignee of this recorded judgment, who was defending himself in chancery, by claiming under the assignment, to notice in his pleading an allegation in the bill that a release of the judgment was improperly entered upon the record. His assignment was not charged as fraudulent.

The attorney who had recovered the judgment which was thus recovered and assigned, was not at liberty to purchase it when his client became sued and execution was issued against him.

THIS was an appeal from the Circuit Court of the United

States for the District of Louisiana, sitting as a court of equity. The suit was originally brought by Stockton in the District Court (State court) of Louisiana, by petition, to enforce a judicial mortgage against a plantation and slaves in the parish of Carroll, which once belonged to Nicholas W. Ford, but at that time was in the possession of James C. Ford, the defendant below, and appellee here. Ford appeared in the State court, and, being a citizen of Louisville, Kentucky, caused the suit to be removed to the Circuit Court of the United States for the Eastern District of Lousiana, where the cause was treated as a suit in chancery for the foreclosure of a mortgage.

The whole of the transactions connected with the suit were very complicated, but it will not be necessary, under the opinion of the court, to state them fully. The following summary will render them intelligible.

On March 11, 1835, the respondent, James C. Ford, sold and conveyed to said Nicholas W. Ford, several parcels of land and a number of slaves, situate in said parish of Carroll, for the consideration of $ 80,000, payable in five annual instalments of $ 16,000 each, the said Nicholas W. Ford thereby giving to the said James C. Ford a mortgage upon the said land and slaves, to have the force and effect of a judgment confessed, for said $ 80,000.

On May 1, 1837, Roger B. Atkinson, of Vicksburg, drew his bill of exchange in favor of William B. Pryor upon N. & E. Ford & Co., of New Orleans, for $ 7,442.74, payable seven months after date. This bill was accepted by the drawees, but was not paid, and after it was protested Pryor became the holder and owner of it. The firm of N. & E. Ford & Co. was composed of Nicholas W. Ford, Edward Ford, and William F. Markham.

On June 10, 1837, three only out of the five annual instalments having been paid to James C. Ford by Nicholas, and James having come under other liabilities for Nicholas, Nicholas executed a mortgage of the land and slaves to secure the whole, and added other slaves.

On April 25, 1838, Nicholas mortgaged an additional number of slaves, with the stock, personal property, and crop.

On May 18, 1839, Nicholas mortgaged the then growing crop of corn and cotton.

In 1839, Pryor brought a suit in the Commercial Court of New Orleans against N. & E. Ford & Co., upon the bill of exchange.

On November 25, 1839, William Ford, Jr., a brother of Nicholas W. and James C. Ford, then aged nineteen years,

and theretofore residing with his father, William Ford, in the county of Bourbon in the State of Kentucky, appeared at the chambers of the judge of the Ninth District Court, Parish of Carroll, Louisiana, and obtained a decree for emancipation, dispensing him from the time prescribed by law for attaining the age of majority, pursuant to the act approved January 23, 1829.

On November 26, 1839, Nicholas sold to William Ford, Jr. all the property in the parish of Carroll, for certain promissory notes.

In December, 1839, judgment was rendered in favor of Pryor in the suit upon the bill for $ 7,442.74, with interest at five per cent. from December 4, 1837.

Mr. Stockton, the appellant, was afterwards employed by Mr. Pryor to attend to his claim against N. & E. Ford & Co., and, entertaining a doubt whether the judgment so recovered was sufficiently specific as to the persons against whom it was rendered, in December, 1839, commenced a suit in the Circuit Court of the United States for the Eastern District of Louisiana, in favor of Pryor, against Nicholas W. Ford, who was the only member of said firm residing in said district, to recover the amount of said bill of exchange.

To this suit Mr. Nicholas W. Ford appeared, and pleaded a former recovery by Pryor, in the Commercial Court of New Orleans, upon said bill, against all the members of said firm of N. & E. Ford & Co., and on the trial of said cause, in support of said plea, produced the record of said judgment so rendered by said Commercial Court, which the court held to be a judgment between the same parties for the same cause of action, and dismissed the suit, with costs.

On March 12, 1840, Pryor assigned his judgment to Jones, as follows: —

"I hereby transfer to Dr. Joseph Jones all my right, title, and interest in a certain judgment in my favor, against N. & E. Ford & Co. of New Orleans, obtained in the Circuit Court of Louisiana, at New Orleans, for about eight thousand dollars, more or less. The said Jones first paying the attorney's fees and all other costs out of the proceeds of said judgment, and then applying the balance to the payment of such debts of mine as said Jones may be responsible for, and the remainder, if any, to be paid over to me.

"Wm. B. Pryor.

"*Vicksburg, 12th March*, 1840."

Jones afterwards assigned this judgment to James C. Ford, the appellee.

On January 2, 1841, the judgment in favor of Pryor was recorded in the mortgage book, making it equivalent to a mortgage.

"I, Felix Bosworth, parish judge in and for the parish of Carroll, in the State of Louisiana, do certify the within copy of judgment to be recorded in my office, in mortgage book B, folio 162.

"Given under my hand and seal of office, this 2d day of January, A. D. 1841.

[L. s.] "FELIX BOSWORTH, *Parish Judge.*"

On May 12, 1841, William Ford, Jr. sold back to Nicholas all the property conveyed on the 26th of November, 1839.

On the same day Nicholas sold and conveyed all the property back to James C. Ford.

On the 7th of February, 1842, Charles M. Way and E. T. Bainbridge recovered a judgment in a suit commenced by them in the Commercial Court of New Orleans, against Pryor and Howard, by which, after a discontinuance as to Howard, they recovered from the defendant, William B. Pryor, $718.12, with five per cent. interest from the 22d of April, 1847, and costs of suit, with privilege on the property attached. Mr. Robert Mott was the attorney who prosecuted the suit for Way and Bainbridge, and Mr. Stockton, the appellant, defended the suit for Pryor.

On February 17, 1842, Felix Bosworth, parish judge of the parish of Carroll, and *ex officio* recorder of mortgages, entered on the mortgage book a release of the mortgage resulting from the recording of the judgment of Pryor against Ford & Co. by writing across the face of the record the following words: "This mortgage released by payment in full, February 17th, 1842. — FELIX BOSWORTH, *Parish Judge.*"

On the 26th of February, 1842, execution was issued on said judgment against Pryor, to the sheriff of said Commercial Court, upon which said sheriff seized, and, after all legal formalities had been complied with, advertised for sale, the right, title, and interest of William B. Pryor in the said judgment recovered in the Commercial Court against N. & E. Ford & Co. for $7,442.74, with interest at the rate of five per cent. per annum, from the 4th of December, 1837; and on the 17th day of March, 1842, pursuant to such seizure and advertisement, said sheriff sold the said judgment of Pryor against N. & E. Ford & Co. to the appellant, for the sum of $300, and on the 19th of April, 1842, conveyed the same to him by deed.

Mr. Stockton was, at the time of the purchase, the holder

of a note drawn by said William B. Pryor, payable to the appellant's order, five days after date, and dated January 2, 1841, for $800.

On the 22d of October, 1842, Stockton, the appellant, instituted in the District Court of Louisiana, for the parish of Carroll, an hypothecary action against the respondent, James C. Ford, and said Nicholas W. Ford, setting forth his purchase of said judgment, the recording thereof on the 2d of January, 1841, and that on the 12th of May, 1841, Nicholas W. Ford, one of said defendants, owned and had possession of a large tract of land and negroes in said parish, and that he had sold them to the respondent, and praying judgment against James C. Ford as the owner and possessor of said property, and that he pay the amount of said judgment and interest, or deliver up said mortgaged property to be sold to satisfy it.

On the 12th of December, 1842, James C. Ford appeared, and obtained an order to remove the cause into the Circuit Court of the United States for the Eastern District of Louisiana. Nicholas W. Ford resided out of the State of Louisiana, and did not appear.

On the 12th of February, 1844, the Circuit Court ordered the case to be put upon the chancery docket, and to be proceeded in as a chancery suit.

It is not necessary to trace the progress of the suit through an amended bill and second amended bill and answer and supplemental and then an amended answer, and changing the pleadings and motions for rehearings.

Numerous depositions were taken, and the cause came on for argument, when, on the 24th of January, 1848, the Circuit Court passed the following decree:—

"R. C. Stockton *v.* J. C. Ford.

"This cause came on to be heard upon the bill, answers, replications, and exhibits; the evidence being adduced, and argument of counsel heard, and the court having maturely considered the same, it is ordered, adjudged, and decreed, that the complainant's bill be dismissed, and the same is hereby dismissed, with costs."

Some further proceedings took place, but at last the decree was made absolute.

The complainant appealed to this court.

It was argued by *Mr. Volney E. Howard* and *Mr. Walker*, for the appellant, and *Mr. Bibb*, for the appellee.

The counsel for the appellant made the following points.

1. It cannot be doubted that the interest of a plaintiff in a

judgment may be seized and sold under execution by the laws of Louisiana. The public sale vests the title. La. Code, Art. 2586; 4 La. Rep. 118; 6 Ib. 543; La. Code of Practice, Art. 647, 690; 11 La. Rep. 125.

2. It was argued below, that the purchase of this judgment by Stockton was the acquisition of a litigious title. According to the Civil Code of Louisiana, article 2623, "A right is said to be litigious whenever there exists a suit and contestation on the same." In this case the right was not litigious, because there was no contest in relation to it. The contest was closed by the judgment. It is well settled in Louisiana, that the purchase of a judgment from which no appeal can be taken is not the acquisition of a litigious right, and may be made by an attorney. (Denton *v.* Wilcox, 2 La. Ann. Rep. 60; Troplong, Vente, Nos. 200-202.) It could not be appealed from after December, 1840. (Code Pr. 593; 12 La. Rep. 206.) Neither was the purchase of the judgment inconsistent with the trust relation of Stockton as plaintiff's attorney therein.

Mr. Pryor is the only person who can urge this objection. Whether Mr. Stockton would, as between him and Mr. Pryor, be permitted to retain the moneys collected upon the judgment for his own benefit, or whether he would hold them in trust for Pryor, does not affect the defendant. In either view, the plaintiff has an unquestionable legal title to the judgment, and an undeniable authority, at law and in equity, as against the judgment debtors and their property, to collect it, or to enforce its payment. Mr. Pryor takes no exception to the act of making the purchase, and knew of the seizure of the judgment. Painter *v.* Henderson, 7 Barr, 48, 50.

There does not appear to be any objection to the purchase of said judgment by the plaintiff, at the public sale made thereof by the sheriff. As attorney defending Mr. Pryor, his authority ceased with the judgment rendered in that action. It is settled that the power of the plaintiff's attorney after judgment extends only to the issuing of execution and receiving the debt, and that he cannot purchase land sold under an execution issued in the cause, as trustee for, nor for the benefit of, his client. The defendant's attorney is not charged with such duty. The seizure of the judgment by the sheriff took it from the control of the plaintiff, as the attorney for its collection on behalf of Mr. Pryor, and his power as attorney to defend Mr. Pryor, in the suit, expired when the judgment was rendered. The defendant is out of court by the judgment. The warrant of attorney is *quousque placitum terminatur;* and the defendant's *placitum* is determined by the judgment. Civil Code, Art. 2854 *et seq.*, Art. 2996; Coke's Second Inst. 378;

Macbeath *v.* Cooke, 1 Moore & Payne, 513, 514; S. C., 4 Bing. 578; Lusk *v.* Hastings, 1 Hill, (N. Y.) 656, 659; Tipping *v.* Johnson, 2 Bos. & Pul. 357; Jackson *v.* Bartlett, 8 Johns. 361; Kellogg *v.* Gilbert, 10 Johns. 220; Beardsley *v.* Root, 11 Johns. 464.

But if the powers of the plaintiff as attorney for Pryor were not determined by the judgment, there are no objections founded on public policy to a purchase by an attorney for the defendant, at a public judicial sale, after the judgment, of the property sold under the execution. As such attorney, it does not form any part of his duty to attend such sale. He has no control over it, which would tend to depress the price. His becoming a bidder with a view to buy must increase the competition in bidding, raise the price, and tend to make it produce the utmost of its value. The principle that purchases made under such circumstances are not obnoxious to objections on the grounds either of legality or propriety, has been repeatedly recognized. Jackson *v.* Woolsey, 11 Johns. 446, 456; Sheldon *v.* Sheldon's Executors, 13 Johns. 220, 223; Prevost *v.* Gratz, Peters's C. C. 364, 378; Campbell *v.* Walker, 5 Ves. 678, 680; Fisk *v.* Sarber, 6 Watts & Serg. 18.

No attempt has been made to prove any unfairness in the sale. It was made with all the formalities prescribed by law. The plaintiff was the highest bidder. The defendants in the judgment were notoriously and hopelessly insolvent, and the property of Nicholas W. Ford had been at all times industriously covered from all claims of his creditors. Nothing but eight years of active litigation has yet been realized from the purchase. The subject of the sale was a very undesirable object of purchase at any price, and no evidence was offered to show that it did not produce its utmost value at the time of sale.

4. If the objection taken by the answer, that the appellant could not acquire the judgment in question by purchase, except in trust for Pryor, be well grounded, the institution of this suit was in conformity with his duty as such trustee. If there were any irregularity in the purchase of the judgment by the plaintiff, the irregularity might be waived by the parties entitled to object to it, and the rights claimed by the plaintiff were confirmed by acquiescence and lapse of time. On a bill to enforce payment of such judgment, a court of equity would not look into such questions on the objection made by the debtor or his grantee, any more than they would into the question of the regularity of recovering such judgment. In the one case, the debtor is not the party affected by the alleged irregularity, nor who can raise the question; in the other, a court of equity

has not the power to determine it. Baker *v.* Morgan, 2 Dow, P. C. 526; Shottenkirk *v.* Wheeler, 3 Johns. Ch. 275, 280; De Riemer *v.* De Cantillon, 4 Ib. 85, 93; Painter *v.* Henderson, 7 Barr, 48, 50; Fairbanks *v.* Blackington, 9 Pick. 93.

5. The objections, that, at the time of the purchase of the judgment of Pryor against N. & E. Ford & Co. by the plaintiff, the right thereto had passed from William B. Pryor to Jones, and that the defendant is the owner of the judgment under the transfer executed by Jones to him, set forth in the original answer, and in the supplemental and amended answer, were disposed of in this record by the amended bill, filed by the plaintiff, by leave of the court, on the 14th of May, 1845, and by the order, taking the allegations of said amended bill as confessed by the defendant, on the 23d of December, 1845. That bill expressly alleges, first, that at the time of the pretended release of February 17, 1842, the said judgment was the property of Pryor, and was then under seizure by process of attachment against him, and had been under said seizure from the 15th of January, 1842. Secondly, that said release was fraudulently and illegally made by the order of one Joseph Jones, by the procurement of the defendant, and without any authority in said Jones so to do. Thirdly, that Jones did not then have, and never at any time did have, or hold and own, said judgment. Fourthly, that Jones is a citizen of Mississippi, out of the jurisdiction of the court, and could not be made a party to the suit. And fifthly, that the mortgage resulting from said judgment was and has been in no degree released or weakened by the said entry purporting to be a release thereof, but still rests upon and binds all said property in the hands of the defendant.

(The other points made by the counsel for the appellant are omitted.)

Points for the appellee (1st point omitted).

There is, however, another view of the subject, which shows that the plaintiff is not the assignee of this judgment of William B. Pryor against N. & E. Ford & Co. William B. Pryor, on the 12th of March, 1840, assigned this very judgment to Dr. Joseph Jones, and that assignment was read. Pryor was discharged in bankruptcy; his deposition was taken. He proves that he had assigned this judgment to Dr. Jones, and that Stockton was his attorney in obtaining that judgment; and that Stockton was at the time of the levy and sale the attorney to collect that judgment; and that Stockton had notice of the assignment to Dr. Jones before his purchase.

Dr. Jones was called as a witness, and he proves that Wil-

liam B. Pryor assigned to him his judgment in the Commercial Court of New Orleans against N. & E. Ford & Co. He identifies the bill of exchange on which the judgment was obtained, as the same on which the Planter's Bank of Mississippi obtained a judgment against Pryor. That record is produced, and it shows that it was for the very bill that Pryor sued N. & E. Ford & Co., the whole of both records being before the court; that Stockton was the lawyer to collect the judgment, and that he caused the assignment from Pryor to him to be filed in the record; that Stockton had full notice of it. He further testifies, that Stockton never notified him of any proceedings to attach or sell this judgment.

C. M. Jones, attorney for J. C. Ford, in his exception, filed immediately on the removal of the cause to the United States Circuit Court, found that the assignment from Pryor to Jones had been filed in court by Stockton, and he formally excepted to Stockton's being assignee, because of that assignment filed by Stockton.

There is, however, another argument, altogether independent of the foregoing, to show that a court of equity cannot hesitate to refuse to recognize Stockton as the purchaser of this judgment of Pryor against N. & E. Ford & Co., and to give him relief on his pretended assignment thereof.

1st. Stockton was the attorney of Pryor in obtaining this judgment for upwards of $8,000, and he was notified of the assignment thereof to Jones, and he was continued as the attorney.

2d. After that assignment, he brought a new suit on the original cause of action, and signed his name to the petition. It was defeated by a plea of *res judicata*, and that the bill was merged in the judgment upon it. This was on the 22d of December, 1840. The assignment to Jones was on the 12th of March, 1840. He was then proceeding for the benefit of the assignee Jones, and not for Pryor.

3d. Standing in this fiduciary relation to Pryor and to Jones, his assignee, when Way & Bainbridge sue out their attachment to sacrifice the interests of his non-resident client, this same R. C. Stockton voluntarily appears in the name of Pryor and files his answer, without notifying Jones or Pryor of the proceeding; and he then, as the attorney of Pryor, accepts service of the notice of judgment. He facilitates the obtaining of a judgment against his client. After judgment, by the practice in Louisiana, the defendant must be notified of a judgment before execution can issue.

4th. Under an execution thus procured, and for the inadequate price of $300, he claims to have become the purchaser

of his client's judgment for $8,000 or $10,000. Can such a proceeding be tolerated by a court of equity? Does he come into equity with clean hands? Will a court of equity look "complacently on such speculations by the officers of a court in the subjects of litigation"?

But this is not all that this record exhibits, to show that Stockton cannot be allowed to maintain this suit, and to stand in judgment as the assignee of this judgment.

By the record of Way & Bainbridge's suit, it would appear that Robert Mott was the attorney employed by Way & Bainbridge to institute and prosecute their suit. His name is signed to the petition. And it would therefore seem that there were contradictory proceedings. It happens, however, that Edmund T. Bainbridge's deposition was taken; and he, one of the plaintiffs in 1845, testified that R. C. Stockton was the lawyer employed to prosecute the suit of Way & Bainbridge, and had corresponded with Way & Bainbridge as their attorney, and that Way & Bainbridge had never got one cent from their judgment against Pryor. And William Prather, the attorney in fact of Way & Bainbridge, and who was one of the assignors to Way & Bainbridge, testifies that Stockton was the attorney of Way & Bainbridge, and the only attorney with whom the assignee of Way & Bainbridge had any correspondence on the subject of that suit.

This complainant is then asking a court of equity to substitute him to the right of Pryor on a judgment for some $10,000 against N. & E. Ford & Co.; and the evidence of that right is, that he, as an attorney and counsellor at law, obtained that judgment for Pryor; that Pryor assigned that judgment to Jones, with his knowledge, and that the trust and confidence in him, as an attorney, was continued in him by Jones; that, after all this, he accepted an employment from Way & Bainbridge to attack the very rights which it was his duty to defend; and that, supposing it would not look well on the record to appear for both plaintiff and defendant, he obtains the use of Mr. Mott's name to the petition of Way & Bainbridge, and he makes a feigned defence for Pryor, with full knowledge that Pryor had assigned the debt. After Pryor's discharge in bankruptcy, he appears and lets a judgment go against him, without notice to either Pryor or Jones, and then, by force of these proceedings, he claims to be himself the owner of this $10,000 judgment, and his clients, Way & Bainbridge, have never got a cent.

Surely, surely it cannot be necessary to argue seriously before the highest court of the nation any further propositions presented by this record. I cannot hesitate to believe, with

confidence, that no enlightened court in Christendom would give their sanction to such proceedings, so far as to subrogate this plaintiff to the rights of Pryor or Jones, or Way & Bainbridge, upon such evidence. And if the case were my own, I should not be disposed to trouble the court one moment longer; perhaps, however, it is my duty to the defendant to notice other points.

The court will observe that N. & E. Ford & Co. failed in 1837–38, and became hopelessly insolvent. This is proven clearly by plaintiff. I am not certain whether it appears, but I believe it does, that some, if not all of them, were discharged as bankrupts. The only chance to make any thing out of this judgment was by this suit against J. C. Ford. The Code of Louisiana, art. 3522, § 22, defines a litigious right to be "one which cannot be exercised without undergoing a lawsuit." And by art. 2622, he against whom a litigious right has been transferred may get himself released by paying to the transferee the real price of the transfer, together with interest from its date." I submit the question under these articles, whether the plaintiff could possibly recover more than $300, with interest, if he had been a stranger to all these records.

Under the title "Compulsory Transfer of Property," the Code, art. 2606, says: "In all cases a fair price should be given to the owner for the thing of which he is dispossessed." Moreover, Stockton was a mandatory, and could not purchase the thing submitted to his charge as a mandatory.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from the Circuit Court of the United States held in and for the District of Louisiana.

The action was commenced in a District Court of the State, and was removed by the defendant to the Circuit Court of the United States, under the twelfth section of the Judiciary Act of 1789.

James C. Ford, the defendant, being the owner of a plantation and slaves in the parish of Carroll, State of Louisiana, on the 11th of March, 1835, sold and transferred the same to Nicholas W. Ford, of Louisville, Kentucky, for the consideration of $80,000 the payment of which was secured by a mortgage upon the property sold. A subsequent mortgage was also given by N. W. Ford and wife, dated the 10th of June, 1837, to the defendant, to secure him against several heavy liabilities he was under for him, and in which mortgage was included some $32,000 of the original purchase-money then remaining unpaid.

On the 26th of November, 1839, N. W. Ford sold and transferred all his interest and estate in the plantation and slaves to William Ford, Jr., for the consideration of $116,207.41, to secure the payment of which, the property sold was mortgaged by the vendee.

On the 12th of May, 1841, William Ford, Jr., resold and conveyed back to Nicholas W. Ford the plantation and slaves, for the same consideration which he had agreed to pay for them, and which was paid by delivering up and cancelling the securities given at the original purchase.

And on the same 12th of May, 1841, Nicholas sold and transferred the plantation and slaves back to the defendant, from whom he had originally purchased them, for a large consideration, made up of a balance remaining due upon the first mortgage and liabilities he was under for Nicholas, and the payment of which he had assumed.

The interest and estate of the defendant in this plantation and slaves, under the title thus derived, are involved in the result of this suit. I have not gone into the particular facts and circumstances attending these several sales and transfers of the property, as the view we have taken of the case, and upon which we shall place our decision, renders it unnecessary to a proper understanding of the question.

The claim of Stockton, the plaintiff, is as follows.

On the 3d of December, 1839, one William B. Pryor recovered a judgment in the Commercial Court of New Orleans against N. & E. Ford & Co., of which Nicholas W. Ford was a member, for $7,442.74, with interest at five per cent. from the 4th of December, 1837, and costs.

On the 2d of January, 1841, this judgment was filed and recorded in the office of the registry of mortgages, and became a lien on the real estate and other immovable property of Nicholas W. Ford. And on the 7th of February, 1842, the firm of Way & Bainbridge recovered a judgment against William B. Pryor for $718.12, with five per cent. interest from the 22d of April, 1837, and costs. An execution upon this judgment against Pryor was issued to the sheriff on the 26th of February, 1842, who seized all his interest in the judgment he had recovered against N. W. Ford; and, on the 17th of March following, in pursuance of such seizure, and after public notice according to law, sold the said judgment to Stockton, the plaintiff in this suit, for $300, he being the highest bidder; and on the 19th of April conveyed the same to him by deed.

The suit before us was instituted by the plaintiff, under a title thus derived to this judicial mortgage, for the purpose of foreclosing the same, and calling upon James C. Ford, the

defendant, to pay the amount of the judgment, principal and interest, or that a sale of the mortgaged premises be ordered.

It will be seen from the foregoing statement that the sale and transfer of the plantation and slaves in question by N. W. Ford to William Ford, Jr. took place on the 26th of November, 1839, and the judgment of Prior against him was filed with the recorder of mortgages on the 2d of January, 1841, although recovered on the 3d of December, 1839, some seven days after the above conveyance.

It further appears, also, that on the 12th of May, 1841, William Ford, Jr. resold and transferred the property to N. W. Ford, who, on the same day, conveyed it to the defendant.

The plaintiff insists, therefore, that this judicial mortgage of Pryor against N. W. Ford, to which he had derived title under the sheriff's sale, became a lien upon the property; — 1st. On the ground that the conveyance of the 26th of November, 1839, was made in fraud of the rights of judgment creditors; but, if not, 2d. That it became a lien from the time of the reconveyance to N. W. Ford, on the 12th of May, 1841, as he then became reinvested with the title.

The view we have taken of the case renders it unimportant to enter upon an examination of either of these questions; and we shall assume that the judgment was a lien upon the interest of N. W. Ford upon one or the other of the grounds above stated.

On the 12th of March, 1840, William B. Pryor assigned this judgment against N. W. Ford to Dr. Jones, to secure him for responsibilities he had assumed for the former, he agreeing to pay over the balance, if any remained after satisfying them. Dr. Jones is a witness in the case, and testifies that the judgment was assigned to him by Pryor as an indemnity for large sums of money which he had paid and was liable to pay for him as surety; and that he had paid for him demands exceeding the amount of the said judgment for which he had no other satisfaction or security. That Pryor took the benefit of the bankrupt act of 1841. That soon after the assignment of the judgment to him he placed on file in the office where the judgment was entered notice of the said assignment; and that the plaintiff had full knowledge of the fact.

These facts are confirmed by the testimony of Pryor, who is also a witness in the case.

The suit was not commenced by Way & Bainbridge against Pryor until the 15th of January, 1842, nearly two years after this assignment of judgment of Pryor against N. W. Ford to Jones. The assignment, as we have seen, was made upon full consideration, without any concealment, or, for aught that ap-

pears, intent to hinder or delay creditors; and was well known to the plaintiff long before he became the purchaser at the sheriff's sale. It passed the legal interest in the judicial mortgage out of Pryor, and vested it in Jones, as early as the 12th of March, 1840; and we are wholly unable to perceive any ground of equity in the plaintiff, or those under whom he holds, for disturbing it through a judgment against the assignor rendered nearly two years afterwards.

The sheriff's sale, therefore, could not operate to pass any interest in it to the plaintiff.

After the parties had proceeded to issue upon the pleadings, the plaintiff applied and obtained leave to withdraw the replication and amend his bill; and in that amendment he set forth, that on the 17th of February, 1842, the recorder of mortgages had entered on the mortgage book in his office a satisfaction and discharge of the judicial mortgage, which at that date was the property of Pryor; that afterwards it had become the property of the plaintiff by virtue of the sheriff's sale and conveyance; and charges, that the entry of satisfaction was illegal and void, as the judgment was then under seizure by the process of attachment in the suit of Way & Bainbridge against Pryor; that Pryor had no right to release the judgment; that he never received payment or satisfaction of the same; and that the discharge of record was fraudulently procured by Jones at the request of James C. Ford, the defendant; and that Jones had no interest or property in the same.

No answer was put in to this amendment, and the allegations were taken as confessed by the defendant.

This branch of the case has occasioned some embarrassment; and it is not readily perceived why the solicitor for the defendant should have omitted to put in the proper answer to the allegations, or have allowed them to be entered as confessed.

It will be seen, however, that the object of the amendment was to get rid of the entry of satisfaction of the judicial mortgage of record, which had been entered by the recorder of mortgages in due form; and which, while it remained, afforded a complete answer to the title set up by the plaintiff under the sheriff's sale; but which, of itself, was not essential, as it respected the ground of defence set up by the defendant. That rested upon the assignment from Pryor to Jones of the 12th of March, 1840. There is no charge made in the amendment of fraud in this assignment, nor any impeachment of its validity, except as may be inferred from the allegation that Jones was not the owner of the judgment, which is stated by way of showing that he possessed no authority at the time to cause the satisfaction to be entered.

The defendant had set up in his first and supplemental answers, expressly, as one of the grounds of his defence, this assignment of the judgment from Pryor to Jones, and from Jones to himself; and that the plaintiff had full knowledge of the same. The fact, therefore, was at issue on the bill, answers, and replication; and, unless it had been directly impeached in the amended bill, no further answer was necessary to enable the defendant to maintain it by the proofs.

This being the state of the pleadings at the time of the amendment of the bill, the admission that the entry of satisfaction of the judgment by the recorder of record was made without authority, and void, did not materially affect the ground and posture of the defence. For while the pleadings were such as enabled the defendant to maintain the force and validity of the assignment by the proofs, he was in a situation to defend himself against the claim of the plaintiff, independently of the question in respect to the entry of satisfaction.

If the amended bill had charged that the assignment had been made in fraud of the rights of creditors, and the charge had been taken as confessed for want of an answer, the question would have been very different. But there is no such allegation.

Indeed, it is somewhat remarkable, that neither in the original bill, nor in the amendments (for there were two amendments), is there to be found a charge impeaching the good faith or validity of this assignment, although its existence was well known to the plaintiff; and while it remained, it was fatal to his deduction of title under the sheriff's sale.

In any view, therefore, that can be properly taken of the case, the plaintiff has shown no right or interest in the judicial mortgage which he seeks to enforce against the plantation and slaves in question. The whole interest had passed to the defendant.

There is another ground of defence set up in the pleadings, and supported by the proofs, which has not been satisfactorily answered. And that is, that the plaintiff was the attorney of Pryor in the judgment against N. W. Ford, employed to enforce its collection; and while holding this relation to him, and after the assignment of Jones to the latter, he became the purchaser in his own name, without communicating the fact to his client, and obtaining his consent. Holding this relation to Jones at the time of the purchase, it was his duty to have advised him of the seizure and sale, so as to have enabled him to prevent a sacrifice of the judgment on the sale; and having not only neglected to do this, but having purchased the judg-

ment himself, a court of equity will fasten upon the purchase a trust for the benefit of the client.

The defendant, therefore, standing in the place of Jones, would, upon clear principles of equity, have a right to demand of the plaintiff the title acquired at the sheriff's sale to the judicial mortgage, on paying the purchase-money. And if the purchase was made in bad faith, and with the intent to speculate at the expense of the rights and interests of the client, using the knowledge derived from that relation for this purpose, the remedy might not be too strong even to set aside the sale, and relieve the property from the encumbrance without the terms mentioned.

It is true, this is not the case of an attorney purchasing property under an execution which he has issued on a judgment, the usual case in which a court of equity has interfered, and declared the purchase to have been made in trust for the client. But the principle is the same. He had the charge of the judgment, and was intrusted with the management of it for the purpose of collection; and can be allowed to do no act in the absence of the client, and without his consent concerning it, by which he may derive an advantage at the expense of the client.

Instead of the judgment, suppose the plaintiff had the charge and management of a plantation and slaves for his client, and an execution should come against them under which they were seized and sold; can it be doubted, if purchased in by the attorney in the absence of the client, and without his consent, that he could not hold the property discharged of the trust growing out of the relation existing between the parties? We suppose not. A court of equity, from the mere fact of such relation, would fasten upon the purchase a trust, without any inquiry into the motives or intentions of the attorney in making the purchase, and compel him to give up its benefits and advantages on the reimbursement of the purchase-money. Neither fraud nor imposition need be shown. The client may, at his election, treat the act as done for his benefit.

There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it.

But it is unnecessary to pursue this branch of the case, or to

place our decision upon it, as the ground already taken, and stated more at large, affords a full and conclusive answer to the claim set up by the plaintiff.

The decree of the court below is affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

JULIA P. HOTCHKISS, EXECUTRIX OF JOHN G. HOTCHKISS, DECEASED, JOHN A. DAVENPORT, AND JOHN W. QUINCY, PLAINTIFFS IN ERROR, *v.* MILES GREENWOOD AND THOMAS WOOD, PARTNERS IN TRADE UNDER THE NAME OF M. GREENWOOD & CO.

A patent granted for a "new and useful improvement in making door and other knobs, of all kinds of clay used in pottery, and of porcelain," by having the "cavity in which the screw or shank is inserted by which they are fastened largest at the bottom of its depth, in form of a dovetail, and a screw formed therein by pouring in metal in a fused state," was invalid.

The invention claimed in the schedule was manufacturing knobs as above described, of potter's clay, or any kind of clay used in pottery, and shaped and finished by moulding, turning, burning, and glazing; and also of porcelain.

The knob was not new, nor the metallic shank and spindle, nor the dovetail form of the cavity in the knob, nor the means by which the metallic shank was securely fastened therein. Knobs had also been used made of clay.

The only thing new was the substitution of a knob made out of clay in that peculiar form for a knob of metal or wood. This might have been a better or cheaper article, but is not the subject of a patent.

The test was, that, if no more ingenuity and skill was necessary to construct the new knob than was possessed by an ordinary mechanic acquainted with the business, the patent was void; and this was a proper question for the jury.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Ohio.

It was a question involving the validity of a patent right, under the following circumstances.

The patent and specification were as follows:—

"The United States of America, to all to whom these letters patent shall come.

"Whereas John G. Hotchkiss, New Haven, Conn., John A Davenport, and John W. Quincy, New York, have alleged that they have invented a new and useful improvement in making door and other knobs, of all kinds of clay used in pottery, and

of porcelain, which they state has not been known or used before their application; have made oath that they are citizens of the United States, that they do verily believe that they are the original and first inventors or discoverers of the said improvement, and that the same hath not, to the best of their knowledge and belief, been previously known or used; have paid into the treasury of the United States the sum of thirty dollars, and presented a petition to the Commissioner of Patents signifying a desire of obtaining an exclusive property in the said improvement, and praying that a patent may be granted for that purpose: These are therefore to grant, according to law, to the said John G. Hotchkiss, John A. Davenport, and John W. Quincy, their heirs, administrators, or assigns, for the term of fourteen years from the 29th day of July, 1841, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said improvement, a description whereof is given in the words of the said Hotchkiss, Davenport, and Quincy, in the schedule hereunto annexed, and is made a part of these presents.

"In testimony, whereof, I have caused these letters to be made patent, and the seal of the Patent-Office has been hereunto affixed. Given under my hand at the city of Washington, this 29th day of July, A. D. 1841, and of the independence of the United States of America the sixty-sixth.

"DANIEL WEBSTER,
Secretary of State.

"Countersigned and sealed with the seal of the Patent-Office.
"HENRY L. ELLSWORTH,
Commissioner of Patents."

"The schedule referred to in these letters patent, and making a part of the same. — To all whom it may concern:

"Be it known that we, John G. Hotchkiss, of the city and county of New Haven, and State of Connecticut, and John A. Davenport and John W. Quincy, both of the city, county, and State of New York, have invented an improved method of making knobs for locks, doors, cabinet furniture, and for all other purposes for which wood and metal, or other material knobs, are used. This improvement consists in making said knobs of potter's clay, such as is used in any species of pottery; also of porcelain; the operation is the same as in pottery, by moulding, turning, and burning and glazing; they may be plain in surface and color, or ornamented to any degree in both; the modes of fitting them for their application to doors, locks, furniture, and other uses, will be as various as the uses to

which they may be applied, but chiefly predicated on one principle, that of having the cavity in which the screw or shank is inserted, by which they are fastened, largest at the bottom of its depth, in form of a dovetail, and a screw formed therein by pouring in metal in a fused state. In the annexed drawing, A represents a knob with a large screw inserted, for drawers and similar purposes; B represents a knob with a shank to pass through and receive a nut; C, the head of the knob calculated to recive a metallic neck; D, a knob with a shank calculated to receive a nut on the outside or front. What we claim as our invention, and desire to secure by letters patent, is the manufacturing of knobs, as stated in the foregoing specifications, of potter's clay, or any kind of clay used in pottery, and shaped and finished by moulding, turning, burning, and glazing; and also of porcelain.

JOHN G. HOTCHKISS,
J. A. DAVENPORT,
JOHN W. QUINCY.

"Witnesses: ALPS. SHERMAN,
JAMES MONTGOMERY."

In October, 1845, the plaintiffs in error brought an action in the Circuit Court of the United States for Ohio, against the defendants, for a violation of the patent right.

The defendants pleaded not guilty, and gave the following notice: —

"The plaintiffs will please take notice, that on the trial of the above cause the defendants will give in evidence to the jury, that the said John G. Hotchkiss, John A. Davenport, and John W. Quincy were not the original and first inventors and discoverers of making or manufacturing knobs of potter's clay or of porcelain. They will also prove that the making of knobs from potter's clay, and also from porcelain and other clays used by potters, was known and practised, and such knobs were made, used, and sold, in the cities of New York, Albany, Troy, and Brooklyn, in the State of New York; also in Jersey City, in the State of New Jersey; also in the city of Philadelphia, State of Pennsylvania; by John Mayer, Thomas Frere, William Lundy, Jr., and Charles W. Vernerck, residing in the city of New York; also by John Harrison, residing in Jersey City, in the State of New Jersey; and by Littlefield, Hattrick, & Shannon, of Philadelphia, in the State of Pennsylvania, long before the 29th day of July, in the year 1841, the date of the patent in the declaration mentioned. They will also prove that similar knobs were manufactured of potter's clay, and also of porcelain, and were also used and sold, long prior to the said 29th day of July, 1841, in the town of Burslem, in Stafford-

shire, England; also in the town of Sandyford, near Tunstall; also in the town of Hanley, Staffordshire, England; also at Woodenbose village, in the county of Derbyshire, England. And the said defendants will prove the manufacture and use of said knobs, so made of clay and porcelain, by Godfrey Webster and John Webster, who now reside in East Liverpool, Columbiana County, Ohio; and also by Enoch Bulloch, who now resides in Wellsville, in the same county; also by Daniel Bennett, who now [resides] in the city of Pittsburg, Pennsylvania; all of whom formerly resided in Staffordshire, England. The defendants will also prove that the said patentees, John G. Hotchkiss, John A. Davenport, and John W. Quincy, at the time of making application for the said patent, well knew that the said knobs so patented had been previously made and sold in a foreign country, to wit, in the kingdom of Great Britain, and also in Germany, and did not believe themselves to be the first inventors or discoverers of manufacturing knobs from potter's clay or porcelain. All of which will be insisted upon in bar of the action.

CHAS. FOX,
Attorney for the Defendants."

And in July, 1848, the following additional notice: —

"The plaintiffs in this cause will please take notice, that on the trial of the cause the defendants will give in evidence to the jury that the said John G. Hotchkiss, John A. Davenport, and John W. Quincy were not the original and first inventors and discoverers of making or manufacturing knobs of potter's clay, or of porcelain; they will also prove that knobs made of potter's clay, and of porcelain and other clays, had been previously publicly used and sold in the cities of New York, Albany, Troy, and Brooklyn, in the State of New York; also in Jersey city, in the State of New Jersey; also in New Haven and Middletown, in the State of Connecticut, long before and at the date of the patent under which the plaintiffs claim; the defendants will likewise prove, on said trial, that John Mayer, residing in Staten Island; Hoope & Lee, residing in the city of Brooklyn, in the State of New York; Edward H. Higgins, John Penfield, John Duntze, residing in Hew Haven, in the State of Connecticut; Matthew Fifo, William Fifo, Jane Fifo, John C. Smith, and certain persons doing business under the name of Smith, Fifo, & Co., residing in the city of Philadelphia, in the State of Pennsylvania, as early as the year 1831, and from that time on, and until, and at the time of obtaining the patent under which the plaintiffs claim, and before the alleged discovery and invention set forth in said patent, made, manufactured, and publicly sold and used, knobs made of potter's

clay, and of other clays, and of porcelain, in the several cities and places named."

The following bill of exceptions was taken during the trial:—

"The plaintiffs offered in evidence the patent specifications and drawings, and other evidence, tending to prove the originality, novelty, and usefulness of the inventions as described in said specification; and other evidence, tending to show the violation of said patent by the defendant, and rested. Whereupon the defendants offered evidence tending to show that the said alleged invention was not originally invented by any one of the said patentees; and that if said invention was original with any of the said patentees, it was not the joint invention of all of said patentees; and other evidence, tending to show that the mode of fastening the shank or collet to the knob, adopted by the plaintiffs, and in said specification described, had been known and used in Middletown, Connecticut, prior to the alleged inventions of the plaintiffs, as a mode of fastening shanks or collets to metallic knobs. And the evidence being closed, the counsel for the plaintiffs insisted in the argument, that, although the knob, in the form in which it is patented, may have been known and used in the United States prior to their invention and patent; and although the shank and spindle, by which it is attached, may have been known and used in the United States prior to said invention and patent, yet if such shank and spindle had never before been attached to a knob made of potter's clay or porcelain, and if it required skill and thought and invention to attach the said knob of clay to the metal shank and spindle, so that the same would unite firmly, and make a solid and substantial article of manufacture, and if the said knob of clay or porcelain so attached were an article better and cheaper than the knob theretofore manufactured of metal or other materials, that the patent was valid, and asked the court so to instruct the jury, which the court refused to do; but, on the contrary thereof, instructed the jury, that, if knobs of the same form, and for the same purposes with that described by the plaintiffs in their specifications, made of metal or other material, had been known and used in the United States prior to the alleged invention and patent of the plaintiffs, and if the spindle and shank, in the form used by the plaintiffs, had before that time been publicly known and used in the United States, and had been theretofore attached to metallic knobs by means of the dovetail and the infusions of melted metal, as the same is directed in the specification of the plaintiffs to be attached to the knob of potter's clay or porcelain, so that if the knob of clay or porce-

lain is the mere substitution of one material for another, and the spindle and shank be such as were theretofore in common use, and the mode of connecting them to the knob by dovetail be the same that was theretofore in use in the United States, the material being in common use, and no other ingenuity or skill being necessary to construct the knob than that of an ordinary mechanic acquainted with the business, the patent is void, and the plaintiffs are not entitled to recover. The counsel for the defendants asked the court to instruct the jury, that, if they should be satisfied that any one of the patentees was the original inventor of the article in question, and that the same was new and useful, yet if they should be satisfied from the evidence that all the patentees did not participate in the invention, the patent is void, and the plaintiffs cannot recover. The court gave the above, modified by the remark, that the patent was *primâ facie* evidence that the invention was joint, though the fact might be disproved on the trial; and the court remarked, there was no evidence except that of a slight presumption against the joint invention as proved by the patent; to which refusal of the court to instruct the jury as asked by the counsel for the plaintiffs, and to the instructions given, the plaintiffs, by their counsel, except, and pray the court to sign this their bill of exceptions.

"JOHN MCLEAN. [SEAL.]"

Upon this exception, the case came up to this court, and was argued by *Mr. Ewing*, for the plaintiffs in error, and *Mr. Chase*, for the defendants in error.

Mr. Ewing, for the convenience of reference, divided the instructions of the court into paragraphs, as follows.

The court instructed the jury, —

1. That if knobs of the same form and for the same purposes with that described by the plaintiffs in their specifications, made of metal or other material, had been known or used in the United States prior to the alleged invention and patent of the plaintiffs:

2. And if the spindle and shank, in the form used by the plaintiffs, had before that time been publicly known in the United States, and had theretofore been attached to metallic knobs by means of the dovetail and infusions of melted metal, as the same is directed, in the specifications of the plaintiffs, to be attached to the knob of potter's clay or porcelain:

3. So that, if the knob of potter's clay or porcelain is the mere substitution of one material for another, and the spindle and shank be such as were theretofore in use in the United States:

4. The material being in common use, and no other in-

genuity or skill being necessary to construct the knob than that of an ordinary mechanic acquainted with the business:

5. The patent is void, and the plaintiffs are not entitled to recover.

It will be seen that the court, in the paragraph of the instructions which I have numbered 4, take upon themselves to determine in the negative the question whether "it required skill and thought and invention to attach the knob of clay to the metal shank and spindle, so that they would unite firmly, and make a solid, substantial article of manufacture," instead of submitting it to the jury. It was a question of fact, not arising upon the construction of a written or printed paper, but depending upon evidence, and ought to have been submitted to the jury if material in the case.

It will also be seen, that the court rejected entirely one clause of the instructions asked; namely, "whether the knob of clay or porcelain thus attached to the metallic shank and spindle were an article better and cheaper than the knob theretofore manufactured of metal or other materials," and gave nothing as a substitute for it, leaving the jury to understand that it was immaterial whether it were a better and cheaper article or not.

The court seem to have been of opinion, first, that it could not, in the nature of things, require skill and thought and invention so to unite the metal and clay as to make them, together, a firm and substantial article of manufacture; or, second, that the new manufacture produced by the substitution of one material for another in part of the article, and the uniting of the two materials, though of dissimilar qualities, and never before united for that purpose, was not patentable, even though it required skill and thought and invention to unite them; and though the new manufacture thus produced were cheaper and better than any like article ever before known.

1st. The first position, I respectfully contend, the court had no right to assume. The counsel had the same right to appeal from the court to the jury, on question of fact, that they had to appeal from that tribunal to this on a question of law. The right to refer this question to the jury was distinctly insisted upon by counsel, and as distinctly denied by the court. For this, I contend, the judgment ought to be reversed.

But if the court had the right to settle this question of fact, as they would have to determine the effect of a written instrument, I think I am able to show that they erred in their opinion on the question.

Knobs had been in use many hundred years; potter's ware and porcelain many thousand; but no one ever before suc-

ceeded in uniting the clay and the iron so as to make of the two a substantial and useful article. There are many difficulties in uniting them, which can be best explained by a careful examination of the new manufacture itself; and if it were proper for the court below to pronounce upon the question connected with it absolutely, on inspection, as a legal conclusion drawn from the article itself, it is equally so for the court here to inspect the article, and determine on inspection whether the decision below was right. Curtis on Patents, §§ 10, 14 (note 2), 15, 16; Webster on Patents, 29, 30.

2d. But the second alternative position is the one on which I understood the court to rest, namely, that the new manufacture produced by the substitution of one material for another, as in this case the substitution of clay or porcelain in the place of metal for the knob, using metal as theretofore for the collet and spindle, was not patentable, though the materials are dissimilar, and were never before united for that or a like purpose; and though it required skill and thought and invention to unite them, and though the new manufacture thus produced was cheaper and better than any like article ever before known.

This position cannot be maintained either by reason or authority. The clay or porcelain knob, connected with the metallic shank is a new and useful manufacture, according to the letter as well as the spirit and *intent of our statute.*

1st. "That it is 'a manufacture' can admit of no doubt; it is a vendible article, produced by the art and hand of man." Per C. J. Tindall, in Cornish *v.* Keene, Webs. on Pat. 517; Boulton *v.* Bull, 2 H. Black. 492, 495, and Ibid. 463, 464, note (a); and Rex *v.* Wheeler, 2 Barn. & Ald. 349, 350.

2d. As the court refused to submit to the jury the question whether the article produced by the substitution of clay or porcelain for metal, &c., in the manufacture of knobs, was better and cheaper than the old article, the charge must rest on the admission that it was better and cheaper. The manufacture which is the result of that combination is, therefore, by concession, "a useful manufacture."

And it is clear that it is in fact a very useful manufacture. The potter's ware and porcelain knobs are almost everywhere taking the place of the metal knob.

3d. It is also a new manufacture.

"The mere substitution of one metal for another in a particular manufacture might be the subject of a patent, if the new article were better, more useful, or cheaper than the old." Curtis on Patents, § 8, note 3.

"No one can say that a silver and an earthen teapot are the same manufacture." Webster on Patents, p. 25, note.

As little can any one say that a metal and an earthen knob are the same manufacture.

"If there be any thing material and new which is an improvement of the trade, that will be sufficient to support a patent." (Per Buller, J. in Rex *v.* Arkwright, Webster's Patent Cases, 71. See Godson on Patents, 63, 70, 124, 126; also Hindemarch on Patents, 124, 126. A list of cases sustaining this point are collected in Curtis on Patents, §§ 9, 10.) Lord Dudley's patent being the substitution of pit-coal for charcoal in the manufacture of iron (Webster's Patent Cases, 14); Neilson's patent, the hot blast instead of the cold (Ib. 152); Crane's patent, the substitution of anthracite for soft coal in connection with the hot blast (Ib. 273). Durome's patent, the application of charcoal, long used in filtering, to the filtering of sugar (Ib. 152.) In Ball's case, the use of the flame of gas instead of the flame of oil to singe off the superfluous fibres of lace (Ib. 99, and note, in which many other similar cases are referred to).

Our invention is a combination of dissimilar materials (not a composition of matter) never before united, which produces a new manufacture. Tindall, C. J., in Crane *v.* Price and others, in speaking of the hot-air blast combined with anthracite coal in the production of iron, says: —

"We are of opinion, that, if the result produced by such combination is either a new article or a cheaper article to the public than that produced by the old method, such combination is an invention or manufacture intended by the statute, and may well become the subject of a patent." "And it falls within the doctrine of Lord Eldon, that there may be a valid patent for a new combination of materials previously in use for the same purpose, or even for a new method of applying such materials." Webster's Patent Cases, 409.

Mr. Curtis, after a review of the cases, says, § 14: "It appears, then, according to the English authorities, that the amount of the invention may be estimated from the result, although not capable of being directly estimated on a view of the invention itself." And in § 15: "The utility of the change is the test to be applied for the purpose. As there cannot be a decidedly new result without some degree of invention to effect that result, where a real utility is seen to exist, a sufficiency of invention may be presumed." And Mr. Webster, in his treatise on the subject-matter, says, that, "whenever the change and its consequences, taken together and viewed as a sum, are considerable, there must be a sufficienc, of invention to support a patent" (pp. 29, 30).

Our courts have applied the same tests as the courts in England. Curtis on Patents, § 18.

As in the case of Kneass *v.* The Schuylkill Bank, 4 Wash. 9–11, where steel plates were used instead of copper plates in printing bank-notes. The question left to the jury was, whether the substitute of steel for copper plates was an improvement. See Curtis on Patents, § 24 and note 1, citing Ryan *v.* Godwin, 3 Sumner, 514, 518.

In the case at bar, the question of skill and invention, and the question of utility, which are the universally acknowledged test questions in this class of cases, were withheld from the jury; the question of skill and invention determined by the court; the question of utility thrown out of the case.

We have, then, by all the rules heretofore recognized in this class of cases, "a new and useful manufacture."

The letter of the statute embraces it; so, clearly, does the spirit and intent of the act. It is indeed an invention of much more than common importance and merit. It is the combination of two materials, metal and earth, never before united in this manner, so as to give to the new manufacture the strength of iron with the durability and beauty of the clay or porcelain; its exemption from the corrosive action of acids and other chemical agents, and its consequent freedom from tarnish.

There are some cases of the application of old inventions to obvious new uses for which courts have refused to sustain a patent. They are referred to by Lord Abinger in Lost *v.* Hagen, Webster's Patent Cases, 208; Curtis, § 7, note 2. Or the case of a double use, where no new manufacture or a cheapening of the old is the result. Ibid., note 3.

In the case of Rex *v.* Fusell, the dampening of cloth by steam instead of hot water would have been held patentable had it been useful. It was frivolous. Crane *v.* Price, Webster's Patent Cases, 409.

And it is said by Mr. Webster, in a note to Crane *v.* Price and others, "that no case is reported or mentioned in any of the books in which a patent has failed simply on the ground of the invention not being the subject-matter of letters patent. Some other ground, as want of novelty or defective specification, having been the real cause of failure."

The counsel for the defendants in error made the following points.

The court now is called upon to decide whether this patent, or whether any patent, can be sustained merely for applying a common, well-known material to a use to which it had not before been applied, without any new mode of using the material, or any new mode of manufacturing the article sought to be covered by the patent.

And here we will first ask the court for a construction of this patent. Does the patent and specification confine its claim to a mere right to use clay or porcelain for the purpose of making or manufacturing knobs, or does it claim to cover the manufacturing knobs of clay and porcelain in the manner or mode set forth in the specification?

The language of the claim, in the closing part of the specification, is as follows: —

"What we claim as our invention, and desire to secure by letters patent, is the manufacturing of knobs, as stated in the foregoing specification, of potter's clay, or any kind of clay used in pottery, and shaped and finished by moulding, turning, burning, and glazing," &c. The patentees had previously stated in their specification that "the modes of fitting them for their application to doors, locks, and furniture, and other uses, will be as various as the uses to which they may be applied, but chiefly predicated on one principle, that of having the cavity in which the screw or shank is inserted, by which they are fastened, largest at the bottom of its depth, in form of a dovetail, and a screw formed therein by pouring in metal in a fused state."

The concluding clause of the specification then claims by the patent to cover the manufacture of knobs made of clay in the manner described in the specification, and the great principle of the manner of forming the knob is by a cavity which, with hot metal poured in, will make a dovetail-shaped fastening or holding of the knob on to the shaft.

We think it clear the claim is for manufacturing knobs of clay in the particular manner specified, so that, when manufactured, they shall be held to the shank by force of the dovetail.

We think it clear that, had not the defendants established the fact on the trial, that knobs for door-handles and for locks had been previously patented to a person in Middletown, which were made and fastened in the same identical way as the ones described in the plaintiffs' specification, the plaintiffs would have claimed the right to recover against us for making and fastening the knobs in that particular way. We suppose the plaintiffs, in the absence of such testimony, would have claimed that their specification covered the form and manner of fastening the knobs to the handle, as well as the material out of which the knob was made. Indeed, such was their claim made at the trial of the cause.

It is now well settled, that, in order fairly to construe a patent, the whole specification must be examined; and if we can gather from the whole paper the meaning of the inventor, and the extent of his claim, the object of the statute is attained. 2 Phillips on Pat. 169, 170; 3 Sumner, 520; Curtis on Pat. §§ 123, 130, 141; 1 Mason, 477.

This case is very similar to the case of Barrett et al. *v.* Hall, 1 Mason, 477, where Judge Story held, that, taking the whole specification, it was manifest the patentee claimed as his invention a mode of dyeing and finishing silks, and not a mode of dyeing alone; and the patent being too broad, the whole not being his invention, the patent was void.

It is also well settled, that whatever appears to be covered by the claim of the patentee as his own invention must be taken as part of the claim; for courts of law are not at liberty to reject any part of the claim; and therefore, if it turns out that any thing claimed is not new, the patent is void, however small or unimportant such asserted invention may be. Curtis on Pat. § 131; 2 Story, 412.

We claim, therefore, that this is in fact a claim for making knobs of clay, combined with the particular manner of fastening the same to the shank by a dovetail fastening, and is in truth a claim for a combination.

If we are correct in this view of the case, then it is clear that the patent is void, as the jury have found that the claim of fastening knobs to handles by dovetail fastenings was not new, but was known and used before the plaintiffs' patent. Winans *v.* Boston and Providence Railroad Co., 2 Story, 413; Hill *v.* Thompson, Webster's Patent Cases, 226, 228.

But suppose that the claim in the patent was the mere right to make knobs of clay or porcelain, without regard to any particular mode of making or fastening the knobs into the shaft, the question arises, Could such a patent be sustained?

The plaintiffs' claim that they have the right to the exclusive use of clay for fourteen years to come, in making knobs for doors, locks, and drawers, by making such a claim known at the Patent-Office. They don't even claim to be the discoverers of clay; but they claim the exclusive right to appropriate and use clay in making knobs.

It is a strange claim, to say the least of it. According to the principle of the claim, one man may claim a patent for making a stove of sheet-iron; another may claim a patent for making stoves of cast-iron; another may claim a patent for making stoves of copper; and each may claim, not the right to make a stove of a particular form and shape only, or by any peculiar process of making, but the exclusive right to make all sorts and shapes of stoves out of the particular material named.

So another man claims the exclusive right of using ice to cool water; another claims the exclusive right to use ice for cooling wine; another, to use the same article to cool brandy; and a physician claims the exclusive right to use the article of ice to cool a fevered patient's head.

Again, one man has been long accustomed to make window-sashes of pine wood; another comes and says he can make window-sashes of cast-iron, and claims the exclusive right to make all the cast-iron sashes the country may want for the next fourteen years.

Another has discovered that he can make the whole of a house out of cast-iron; he therefore claims the exclusive right to make all the cast-iron houses that are wanted for fourteen years to come.

Another says he has discovered that he can build splendid railroad-cars for the conveyance of passengers out of sheet copper or tin; he therefore obtains a patent for the exclusive use of copper and tin in making such carriages.

Another discovers that teakettles have been made of cast-iron for years past, but tea and coffee pots have not as yet been made of that material, and he immediately obtains a patent for the exclusive right to make cast-iron tea and coffee pots for fourteen years.

We know that cast-iron has been extensively used for making machinery of different shapes and forms; for making columns, fences, floors, and indeed every thing whose shape can be impressed upon sand; and can it be pretended that any one at this day can claim the right to make some new thing out of cast-iron, and thereby exclude all other persons from making the same article out of the same material?

To allow such a claim, it appears to us, would be violating the spirit of the act of Congress. The object of the act of Congress is to encourage men to devote their time and talent in making new and useful discoveries in the arts, manufactures, and compositions of matter. Why does the act provide so carefully for new compositions of matter, if an individual could obtain a patent for a use of an element of matter without any composition at all?

The patentee in this case is endeavoring to add a new clause to the patent law. He is claiming the right to apply a common element of nature to a new purpose, without the aid of any new mode or process of working it, and without combining it with any other portions of matter so as to make it a composition.

The only causes authorizing the issuing of a patent are declared and set forth in the sixth section of the act of 1836. That section enacts, "that any person or persons, having discovered or invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements on any art, machine, manufacture, or composition of matter, not before known or used, &c., may make applica-

To satisfy the terms of the statute, there must be some new art, machine, manufacture, or composition of matter discovered, or there can be no patent.

It is well settled, that a patent cannot be granted for a new use of the thing, or, as it is commonly stated, a double use. The application of an old machine to some new purpose is not the foundation of a patent; but an improvement of an old machine, in order to apply it to the same purposes more advantageously, is the subject of a patent. But in this latter case, it is the particular improvement made in the machine which constitutes the basis of the patent, not the result.

If in the present case the patentees had invented an improvement in the mode of fastening the knobs to the handles, or if they had invented a new mode of making knobs out of clay or other materials, their patent might have been sustained; but we maintain they cannot obtain a patent for a new use, or double use, of the article of clay, any more than they could sustain a patent for a new use of an old machine.

It has been decided, that, where a certain description of wheels had been used on other than railway-carriages, a patent could not be sustained for the use of such wheels on railway-carriages. Curtis, note to § 87. The court distinguished between applying a new contrivance to an old object, and applying an old contrivance to a new object. Losh *v.* Hague, Webster's Patent Cases, 207. The learned judge stated that a patent cannot be had for applying a well-known thing, which might be applied to fifty thousand different purposes, to an operation which is exactly analogous to what was done before. 2 Story, 412.

So it has been held that a patent for curling palm-leaf for mattresses could not be sustained, where the same process had been long in use for curling hair. Howe *v.* Abbott, 2 Story, 190, 193.

In this latter case the judge remarked that it was the mere application of an old process and old machinery to a new use. The same as if a coffee-mill were employed to grind corn, or a flax-machine were employed to spin cotton. There must be some new mode or process to produce the result.

If new effects are produced by an old machine in its unaltered state, no patent can be supported for it, as such a patent would be for an effect only. 1 Gallison, 478, 481.

So in the new use of medicines or compositions, as is said in Boulton *v.* Hall, 2 H. Bl. 487. Suppose the world were better informed than it is how to prepare Dr. Jayne's fever-powder, and an ingenious physician should find out that it was a specific cure for a consumption, if given in particular

quantities; could he have a patent for the sole use of Jayne's powders in consumption, or to be given in particular quantities? I think it must be conceded that such a patent would be void, and yet the use of the medicine would be new, and the effect of it as materially different from what is now known, as life is from death.

So the same judge says the use of arsenic for curing agues could not be patented, because the medicine would not be new, and a new use of it is not the subject of a patent.

We claim, therefore, that this patent cannot be sustained as a patent for the exclusive privilege of using clay for the manufacture of knobs, instead of brass, silver, or metallic compositions. That such a claim does not rise to the dignity of an invention or discovery, but is a mere substitution of one material in place of another, for making the same common article. There is no change proposed in the manner of working the clay, no improvement in machinery used to produce the result, and no new result is obtained; the same identical knobs are produced and applied in the same way; the only change is in the material used, and we suppose that a mere change of one material for another cannot be the subject of a patent.

The case then comes within the principle laid down in Phillips on Patents, p. 113: "The use of the ordinary known materials cannot be monopolized by patent. We must understand this doctrine to be limited to known materials, and to such as naturally exist, whether known or not; for the discovery of a new elementary substance or material, by analysis or otherwise, does not give a right of a monopoly of it." 2 H. Bl. 487.

On the argument of this latter case the court put the question to counsel, "whether, if a man by science were to devise the means of making a double use of a thing known before, he could have a patent for that? It was rightly and candidly admitted that he could not." (p. 486.)

And Justice Eyre says of Hartley's patent: "He did not invent those means; the invention wholly consisted in the new manner of using, or, I would rather say, of disposing a thing in common use, and which thing every man might make at his pleasure; and which, therefore, I repeat, could not, in my judgment, be the subject of the patent."

We claim that there can be no patent in the United States founded upon the material used, unless where a new combination of materials is made use of, and then it comes under that clause of the patent law which authorizes a patent for any new composition of matter.

Without a new composition of matter, or a new mixture of

the ingredients used, or a new proportion of ingredients used, there can be no patent for the material used in the production of the article. To hold otherwise would be to repeal this clause of the statute, or rather to add a new clause to it. The act has declared a man may obtain a patent for discovering a new composition, or mixing of substances, so as to produce a new substance; but it has not declared that any one can obtain a patent for the exclusive use of an element of matter, where no combination or mixture of different portions of matter is set forth.

Clay, and its suitability for being manufactured into articles of different shapes, and to be applied to different purposes, is well known. The mode of moistening and using it, and making it into knobs, teapots, plates, bowls, cups and saucers, &c., and of glazing, staining, and baking it, is also well known, and no change is proposed in these operations. The use of brass, iron, silver, and glass, for the manufacture of knobs for doors and drawers, is also well known. The particular mode of fastening claimed by the plaintiffs is shown not to be new; and, as before remarked, all that can be now claimed in this record is, the exclusive right to use clay instead of metal in making these knobs.

We know of no case in which such a claim has been sustained. We have shown, from the authorities, that the new use of an old machine to produce a new effect is not the subject of a patent.

We have shown that the new use of an old medicine or composition of matter cannot be patented; and surely, if a composition of matter (which requires mind and skill) could not be applied to a new use, the application of one of the substances of which the composition was made could not be applied to a new use, and thereby lay the foundation for a patent. And we have also shown that the substitution of one material for another is not a patentable subject.

We claim, therefore, in conclusion, that this patent is void,—

1st. Because it claims in its specification to have invented the mode of fastening the knob to the handle, which the verdict of the jury has shown to be untrue, and therefore the claim is larger than the invention.

2d. Because a patent for the substitution of one material for another, without any combination, or any new mode or process of manufacturing the article, cannot be sustained.

3d. Because no patent for the manufacture of an article can be sustained, unless the particular mode of manufacturing the article is specified and is new, and the difference between the old and new mode of manufacturing is pointed out.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of Ohio.

The suit was brought against the defendants for the alleged infringement of a patent for a new and useful improvement in making door and other knobs of all kinds of clay used in pottery, and of porcelain.

The improvement consists in making the knobs of clay or porcelain, and in fitting them for their application to doors, locks, and furniture, and various other uses to which they may be adapted; but more especially in this, that of having the cavity in the knob in which the screw or shank is inserted, and by which it is fastened, largest at the bottom and in the form of dovetail, or wedge reversed, and a screw formed therein by pouring in metal in a fused state; and, after referring to drawings of the article thus made, the patentees conclude as follows: —

"What we claim as our invention, and desire to secure by letters patent, is the manufacturing of knobs, as stated in the foregoing specifications, of potter's clay, or any kind of clay used in pottery, and shaped and finished by moulding, turning, burning, and glazing; and also of porcelain."

On the trial evidence was given on the part of the plaintiffs tending to prove the originality and usefulness of the invention, and also the infringement by the defendants; and on the part of the defendants, tending to show the want of originality; and that the mode of fastening the shank to the knob, as claimed by the plaintiffs, had been known and used before, and had been used and applied to the fastening of the shanks to metallic knobs.

And upon the evidence being closed, the counsel for the plaintiffs prayed the court to instruct the jury that, although the clay knob, in the form in which it was patented, may have been before known and used, and also the shank and spindle by which it is attached may have been before known and used, yet if such shank and spindle had never before been attached in this mode to a knob of potter's clay, and it required skill and invention to attach the same to a knob of this description, so that they would be firmly united, and make a strong and substantial article, and which, when thus made, would become an article much better and cheaper than the knobs made of metal or other materials, the patent was valid, and the plaintiffs would be entitled to recover.

The court refused to give the instruction, and charged the jury that, if knobs of the same form and for the same purposes as that claimed by the patentees, made of metal or other ma-

terial, had been before known and used; and if the spindle and shank, in the form used by them, had been before known and used, and had been attached to the metallic knob by means of a cavity in the form of dovetail and infusion of melted metal, the same as the mode claimed by the patentees, in the attachment of the shank and spindle to their knob; and the knob of clay was simply the substitution of one material for another, the spindle and shank being the same as before in common use, and also the mode of connecting them by dovetail to the knob the same as before in common use, and no more ingenuity or skill required to construct the knob in this way than that possessed by an ordinary mechanic acquainted with the business, the patent was invalid, and the plaintiffs were not entitled to a verdict.

This instruction, it is claimed, is erroneous, and one for which a new trial should be granted.

The instruction assumes, and, as was admitted on the argument, properly assumes, that knobs of metal, wood, &c., connected with a shank and spindle, in the mode and by the means used by the patentees in their manufacture, had been before known, and were in public use at the date of the patent; and hence the only novelty which could be claimed on their part was the adaptation of this old contrivance to knobs of potter's clay or porcelain; in other words, the novelty consisted in the substitution of the clay knob in the place of one made of metal or wood, as the case might be. And in order to appreciate still more clearly the extent of the novelty claimed, it is proper to add, that this knob of potter's clay is not new, and therefore constitutes no part of the discovery. If it was, a very different question would arise; as it might very well be urged, and successfully urged, that a knob of a new composition of matter, to which this old contrivance had been applied, and which resulted in a new and useful article, was the proper subject of a patent.

The novelty would consist in the new composition made practically useful for the purposes of life, by the means and contrivances mentioned. It would be a new manufacture, and none the less so, within the meaning of the patent law, because the means employed to adapt the new composition to a useful purpose was old, or well known.

But in the case before us, the knob is not new, nor the metallic shank and spindle, nor the dovetail form of the cavity in the knob, nor the means by which the metallic shank is securely fastened therein. All these were well known, and in common use; and the only thing new is the substitution of a knob of a different material from that heretofore used in connection with this arrangement.

Now it may very well be, that, by connecting the clay or porcelain knob with the metallic shank in this well-known mode, an article is produced better and cheaper than in the case of the metallic or wood knob; but this does not result from any new mechanical device or contrivance, but from the fact, that the material of which the knob is composed happens to be better adapted to the purpose for which it is made. The improvement consists in the superiority of the material, and which is not new, over that previously employed in making the knob.

But this, of itself, can never be the subject of a patent. No one will pretend that a machine, made, in whole or in part, of materials better adapted to the purpose for which it is used than the materials of which the old one is constructed, and for that reason better and cheaper, can be distinguished from the old one; or, in the sense of the patent law, can entitle the manufacturer to a patent.

The difference is formal, and destitute of ingenuity or invention. It may afford evidence of judgment and skill in the selection and adaptation of the materials in the manufacture of the instrument for the purposes intended, but nothing more.

I remember having tried an action in the Circuit in the District of Connecticut some years since, brought upon a patent for an improvement in manufacturing buttons. The foundation of the button was wood, and the improvement consisted in covering the face with tin, and which was bent over the rim so as to be firmly secured to the wood. Holes were perforated in the centre, by which the button could be fastened to the garment. It was a cheap and useful article for common wear, and in a good deal of demand.

On the trial, the defendant produced a button, which had been taken off a coat on which it had been worn before the Revolution, made precisely in the same way, except the foundation was bone. The case was given up on the part of the plaintiff. Now the new article was better and cheaper than the old one; but I did not then suppose, nor do I now, that this could make any difference, unless it was the result of some new contrivance or arrangement in the manufacture. Certainly it could not, for the reason that the materials with which it was made were of a superior quality, or better adapted to the uses to which the article is applied.

It seemed to be supposed, on the argument, that this mode of fastening the shank to the clay knob produced a new and peculiar effect upon the article, beyond that produced when applied to the metallic knob, inasmuch as the fused metal by which the shank was fastened to the knob prevented the shank

from acting immediately upon the knob, it being inclosed and firmly held by the metal; that for this reason the clay or porcelain knob was not so liable to crack or be broken, but was made firm and strong, and more durable.

This is doubtless true. But the peculiar effect thus referred to is not distinguishable from that which would exist in the case of the wood knob, or one of bone or ivory, or of other materials that might be mentioned.

Now if the foregoing view of the improvement claimed in this patent be correct, it is quite apparent that there was no error in the submission of the questions presented at the trial to the jury; for unless more ingenuity and skill in applying the old method of fastening the shank and the knob were required in the application of it to the clay or porcelain knob than were possessed by an ordinary mechanic acquainted with the business, there was an absence of that degree of skill and ingenuity which constitute essential elements of every invention. In other words, the improvement is the work of the skilful mechanic, not that of the inventor.

We think, therefore, that the judgment is, and must be, affirmed.

Mr. Justice WOODBURY dissented.

I feel obliged to dissent from my brethren in this case. It is chiefly, however, in regard to the manner in which some of the facts were submitted to the jury; but, involving as it does an important principle in the practice under our patent system, it may be useful to explain the grounds of my dissent.

It is agreed, that in July, 1841, John G. Hotchkiss and two others obtained a patent for what they described as "a new and useful improvement in making door and other knobs of all kinds of clay used in pottery, and of porcelain."

The first question of law which arises on the record is, whether the patent covered merely the knob, the bulbous handle, or included also the shank or spindle, and the mode of fastening it to the handle.

The charge of the judge at the trial, as drawn up in the exceptions, seems to have proceeded on the ground that the patent and invention covered both the knob and mode of fastening. Whether this was a correct construction does not, however, seem to be very material, when we consider the instructions given to the jury in other respects; and that they were equally applicable to the bulbous handle alone, or the handle with its dovetail hollow, or the handle and the shank combined.

If both parties acquiesced below in the idea that the patent

was not only for such a knob, but the combination of such a knob with the shank in the mode described, and the charge was predicated on that view, it is, perhaps, not allowable here to take a different position.

In order to understand clearly what is deemed objectionable in the course pursued below, it may be noticed that the chief grounds of objection to the patent thus construed below seem to have been, that the invention was not original, nor of a character to be patentable.

The statement in the bill of exceptions is in some respects obscure. But the substance of the instruction on this, as set out there, is, that if the invention had been made before or was now confined, "so that the knob of clay or porcelain is the mere substitution of one material for another," — "the material being in common use and no other ingenuity or skill being necessary to construct the knob than that of an ordinary mechanic acquainted with the business, — the patent is void," &c.

The counsel for the plaintiffs next requested the court to proceed further, and charge the jury, that, "if the said knob of clay or porcelain so attached were an article better and cheaper than the knob theretofore manufactured of metal or other materials, the patent was valid." But the court did not give any such instruction. In this, I think, was the chief error. From the record I feel bound to believe that evidence was offered on both sides as to the originality and utility of the knob, and its mode of combination with the shank. It would seem, then, to have been the duty of the court below to instruct the jury, that it was their province to decide not only on which side the evidence preponderated, but if the invention was cheaper and better than what preceded it, that protection should be given to it as patentable.

In either view, considered as an invention of the knob alone, or the knob and handle combined, the chief question is still the same, whether proper instructions as to its being patentable, and all the proper instructions which the circumstances required, were given.

Now, on the point as to the invention being patentable, the direction virtually was to consider it not so, if an ordinary mechanic could have made or devised it; whereas in my view the true test of its being patentable was, if the invention was new, and better and cheaper than what preceded it. This test, adopted by the Circuit Court, is one sometimes used to decide whether the invention for which a patent has been obtained is new enough or distinguished enough from a former invention to prevent it from being an infringement, and to justify a new

patent for it, and not, as here, whether it is valuable or material enough *per se* to be protected by any patent.

Whenever the kind of test adopted below is used otherwise than to see if there has been an infringement or not, it is to ascertain whether the invention is original or not, that is, whether it is a trifling change and merely colorable or not. Webster on Sub. Mat. 25; Curtis on Patents, §§ 6, 7; 2 Gallis. C. C. 51; 1 Mason, C. C. 182. But it is impossible for an invention to be merely colorable, if, as claimed here, it was better and cheaper; and hence this last criterion should, as requested by the plaintiffs, have been suggested as a guide to the jury.

Then, if they became convinced that the knob in this case, by its material, or form inside, or combination with the shank, was in truth better and cheaper than what had preceded it for this purpose, it would surely be an improvement. It would be neither frivolous nor useless, and, under all the circumstances, it is manifest that the skill necessary to construct it, on which both the court below and the court here rely, is an immaterial inquiry, or it is entirely subordinate to the question, whether the invention was not cheaper and better. Thus, some valuable discoveries are accidental rather than the result of much ingenuity, and some happy ones are made without the exercise of great skill, which are still in themselves both novel and useful. Such are entitled to protection by a patent, because they improve or increase the power, convenience, and wealth of the community.

Chancellor Kent has truly said (2 Kent's Comm. 371), "The law has no regard to the process of mind by which the invention was accomplished, whether the discovery be by accident or by sudden or by long and laborious thought." See also Earle *v.* Sawyer, 4 Mason, C. C. 1, 6; Crane *v.* Price, Webster's Pat. Cases, 411.

In this last case, Chief Justice Tindall goes quite as far as Chancellor Kent, and says: "In point of law, the labor of thought or experiment and the expenditure of money are not the essential grounds of consideration on which the question whether the invention is or is not the subject-matter of a patent ought to depend. For if the invention be new and useful to the public, it is not material whether it be the result of long experiments and profound research, or whether by some sudden and lucky thought or mere accidental discovery."

So in Earle *v.* Sawyer, 4 Mason, 1, the doctrine settled is, that "a combination, if simple and obvious, yet if entirely new, is patentable. And it is no objection to it, that up to a certain point it makes use of old machinery." And Justice Story says, in so many words: "It is of no consequence whether

the thing be simple or complicated, whether it be by accident or by long, laborious thought, or by an instantaneous flash of the mind, that it was first done." "The law looks to the fact, and not the process by which it is accomplished." (p. 6.)

It is thus apparent to my mind that the test adopted below for the purpose to which it was applied, and which has just been sanctioned here, has not the countenance of precedent, either English or American; and, at the same time, it seems open to great looseness or uncertainty in practice.

But it has been urged here, that this invention was merely applying clay and porcelain to a new purpose, and that merely a new purpose, in our patent system, is not entitled to protection. 2 Story, 190, 412; Losh *v.* Hague, Webster Pat. Cas. 207; Curtis on Patents, 87. The meaning of this rule, however, as eviscerated from all the cases is, that the application of an old machine or old composition of matter before patented to a new object, or what is termed a double use, does not entitle one to a patent connected with this new object; because then there is no new machinery or new combination of old parts, as in merely applying a patent grist-mill to a new purpose of grinding plaster.

But it is entirely different if you apply an old earth, or old mechanical power, or old principle in physics, to a new object. There is then a new form adopted, or a new combination for the purpose. And though the elementary material be old, or the elementary principle operating be old, it being difficult to discover a new substance or new elementary principle, yet there is a new shape and consistency and use given, or a new *modus operandi*, which, if cheaper and better, benefits the world and deserves protection and encouragement.

If these are the effects, however small the skill or ingenuity required to imitate them, they are not excluded from the aid of the laws by either principles or precedents. They are not mere double uses of a previous machine or composition; but a double or additional form or composition of an article for a new purpose.

There is a new manufacture, as here of clay into knobs, or knobs with a dovetail hollow combined with a shank. The books are full of such slight changes in structure, composition, or mode of application, which were novel, and better in their results, and therefore upheld, and were not and could not be regarded merely as the application of an old machine to new purposes. Beside the new material and the new mode of fastening, when the results as here are considerably improved, they suffice to make the invention patentable. (Webster on the Sub. Matter, 29, 30.) These are then all required by the

strictest law, viz. "diversity of method" and "diversity of effect." Phillips on Patents, 122.

Here, the new material for a knob, instead of former materials, was more durable than wood, was cheaper than iron, and very beautiful to the eye, instead of looking coarser. Its structure to receive a dovetailed shank and secure it by fused metal, rather than by a hole through and a screw at the end, appears to have been highly important; and if embraced in the patent, as was probably considered in the court below, furnished an additional reason for instructing the jury to consider whether the knob in controversy was not cheaper and better than what preceded it.

The precedents are quite full on this, and some of them in all respects nearly in point. Similar to this was the hot blast, substituted for the cold in making iron, and a patent for it upheld. Neilson's Case, Webster, P. C. 14. The blast was still air, but in a different condition, leading to new and useful results. So the use of the flame of gas to finish cloth rather than the flame of oil. Webster, P. C. 99. So steel plates used instead of copper in engraving. Kneass *v.* Schuylkill Bank, 4 Wash. C. C. 9, 11. That very closely resembles the present case.

So pit-coal, substituted for charcoal in making iron, has been deemed patentable (Webster, P. C. 14); and anthracite for bituminous coal (273.) There are also some strong opinions beside these decisions in favor of a change in metal for an instrument being alone sufficient for a patent, if more useful or cheaper. See Webster on Sub. Matter, 25, note, and Curtis on Patents, § 8. (Phillips on Patents, 134, if there be any contrivance connected with it.) Indeed, why should it not be sufficient? A new mode of operating or a new composition to produce better results is the daily ground for a patent. All which the act of Congress itself requires is that the invention be for "any new and useful improvement on any art, machine, manufacture, or composition of matter," &c. 5 Stat. at Large, p. 119, § 6. Must it not then be considered such an improvement, if operating with new materials both cheaper and more durable?

Who cannot realize that, since the improved modes of cutting, boring, and shaping, the substitution of iron for wood in many manufactures might not often be a gain in strength and durability, quite beyond any difference in expense, and be justly patentable? Who, too, would not deem it material to gain by the use of wood or leather, or a cheap metal, instead of gold and silver, for some manufacture or mechanical purpose, when it can be done with increased benefit as well as cheapness. And why is not he a benefactor to the commu-

nity, and to be encouraged by protection, who invents a use of so cheap an earth as clay for knobs, or in a new form or combination, by which the community are largely gainers?

On the whole case, then, it seems to me that justice between these parties, as well as sound legal principle, requires another trial on instructions upon some points omitted, and instructions in some other respects different in law from what were given in this instance at the first trial.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Ohio, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

MARY REESIDE, EXECUTRIX OF JAMES REESIDE, PLAINTIFF IN ERROR, *v.* ROBERT J. WALKER, SECRETARY OF THE TREASURY OF THE UNITED STATES.

According to the practice in Pennsylvania, where a defendant pleads set-off, the jury are allowed to find in their verdict the amount that the plaintiff is indebted to the defendant, and according to their mode of keeping records this result is entered by way of note; e. g. "new trial refused and judgment on the verdict."

Although this may be a good record in the courts of Pennsylvania, it does not follow that it is so in the courts of the United States.

The effect of such a judgment, that the plaintiff is indebted to the defendant, is merely to lay the foundation for a *scire facias* to try this new cause of action.

Where the United States were the plaintiffs, and a verdict was rendered that they were indebted to the defendant, and an application was made for a mandamus to compel the Secretary of the Treasury to credit the defendant upon the books of the Treasury with the amount of the verdict, and to pay the same, the mandamus was properly refused by the Circuit Court. For a mandamus will only lie against a ministerial officer to do some ministerial act where the laws require him to do it and he improperly refuses to do so.

Besides, there was no appropriation made by law, and no officer of the government can pay a debt due by the United States without an appropriation by Congress.

To sanction a judgment under a plea of set-off would virtually be allowing the United States to be sued, which the laws do not allow.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington.

James Reeside, in his lifetime, was one of the contractors with the Post-Office Department for the transportation of the mail, and claimed sundry extra allowances, which were not al-

lowed by the Department. In consequence, thereof, a dispute arose between the parties, and in October, 1839, the United States brought an action in the Circuit Court for the Eastern District of Pennsylvania against Reeside, for the sum of $32,709.62, which they claimed to have overpaid him.

The whole history of this suit is summed up in the following transcript of the record: —

"In the Circuit Court of the United States, in and for the Eastern District of Pennsylvania, in the Third Circuit, October Session, 1839.

"THE UNITED STATES OF AMERICA *v.* JAMES REESIDE.

"Summons case. — Real debt $32,709.62, as per statement of account from Auditor Post-Office Department, as late mail contractor. Exit 5th Sept. 1837.

"1837, Oct. 11. — Returned, 'Served.'

"1840, January 25. — Interrogatories filed and ruled for comm'n e. p. defendant to Bedford, Pennsylvania, sec. reg.

"1840, February 4. — Rule on plaintiffs to declare, sec. reg.; 18 interrogatories filed and rule for comm'n e. p. defendants to Hollidaysburg, Pennsylvania, sec. reg.

"1840, March 2. — Narr. filed; 6th, defendant pleads payment; replication *non solvit*, and issues and rule for trial by special jury and ca.

"1841, March 2. — Agreement for taking the deposition of Richard M. Johnson, a witness for defendant at the city of Washington, on forty-eight hours' notice to the Auditor Post-Office Department, filed.

"1841, August 4. — Agreement taking deposition of R. M. Johnson, at Frankfort, Kentucky; and interrogatories filed; deposition of R. M. Johnson filed.

"1841, October 22. — Defendant pleads *non assumpsit* and set-off and issues and ca.; and now [a] jury being called, come, to wit, Edward C. Biddle, S. M. Loyd, Thomas Connell, George McLeod, Michael F. Groves, John C. Martin, William C. Hancock, Joseph Harrison, Jr., Joseph Parker, William Parker, William Gibson, and Thomas Cook, who are respectively sworn or affirmed, &c.; deposition of Pishey Thompson filed.

"1841, December 6. — And now the jurors aforesaid, on their oaths and affirmations aforesaid, respectively do say, that they find for the defendant, and certify that the plaintiffs are indebted to the defendant in the sum of $188,496.06; judgment *nisi*. On motion of Messrs. Read & Cadwallader, for plaintiffs, for a rule to show cause why a new trial should not be granted, and for leave to move for such new trial, on exceptions to the ruling of the court on questions of evidence and matters of

law, embraced in the charge of the court, without such motion being deemed a waiver thereof, the motion is received; notice thereof to be given to the opposite counsel; returnable 1st Monday in January next.

"1841, December 9.—Reasons for a new trial filed.

"1842, May 12.— Motion for new trial overruled; new trial refused, and judgment on the verdict; copy of assignment, James Reeside to John Grey; and copy of notice, James Reeside to Postmaster-General, filed.

"1842, July 27.— Præcipe for writ of error filed.

"UNITED STATES, *Eastern District of Pennsylvania, sct.*

"I certify the foregoing to be a true and faithful transcript of the docket entries in the above-named suit.

"In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court at Philadelphia, this 4th day of January, A. D. 1847, and in the seventy-first year of the independence of the said United States.

"GEORGE PLITT."

In September, 1842, James Reeside died, and Mary Reeside, his widow, became his executrix.

On the 4th of November, 1848, Mary Reeside filed a petition in the Circuit Court of the United States for the District of Columbia, in and for the county of Washington. The petition stated the above facts, and with it was filed the transcript of the record as it has been set forth. It concluded as follows:—

"Wherefore, your petitioner does respectfully pray, that your honors, the premises considered, will award the United States writ of mandamus to be directed to the said Robert J. Walker, Secretary of the Treasury Department of the United States, commanding him,—

"First. That he shall enter or cause to be entered upon the books of the Treasury Department of the United States, under date of May 12th, 1842, a credit to the said James Reeside of the sum of $ 188,496.06.

"Second. That he shall pay to your petitioner, as executrix as aforesaid, the said sum, with interest thereon from the said 12th day of May, 1842.

"And your petitioner shall ever pray, &c.

"MARY REESIDE."

The Circuit Court ordered that the motion for a mandamus be overruled, and the prayer of the petitioner rejected. Whereupon Mary Reeside sued out a writ of error, and brought the case up to this court.

It was argued by *Mr. Goodrich*, for the plaintiff in error, and *Mr. Crittenden* (Attorney-General), for the defendant in error.

Mr. Goodrich, for the plaintiff in error, made the following points.

The application for relief, in the court below, was of double aspect. First, that the Secretary of the Treasury be directed to enter to the credit of James Reeside, under proper date, upon the books of the Treasury Department, the amount of the verdict and judgment aforesaid. Second, that the Secretary of the Treasury be directed to pay the amount of such credit, with interest thereon, to the complainant.

Is the plaintiff in error entitled to the relief sought, or any part thereof? It may be urged, that the United States cannot be sued. As a general proposition, it may be admitted. It is equally true that the United States may be sued with its own consent. United States *v.* McLemore, 4 Howard, 288; Hill *v.* United States, 9 Howard, 389. Its officers, in their representative capacity, may be sued with consent of the government. The right of the citizen against the government may be judicially ascertained, if the legislative department so provide; and such adjudication, rightfully had, must be conclusive, unless express provision to the contrary is made. The judiciary may be authorized to determine the right, to pass a judgment or decree which shall bind the government, and may not have authority to issue execution against the government or its property. It is equally true that it is the duty of every government, especially of the United States, to provide some mode for the ascertainment and liquidation of the claims of the citizen against the government. The mode adopted in England and in this country, in many cases, is by authorizing a resort to the judiciary; sometimes such resort is permitted in the first instance, but generally after an unsuccessful application to some department or commission. Wherever the United States have authorized recourse to the judiciary, and the right has been contested or settled by the judiciary in the mode prescribed, such judicial action upon the right — I speak not of the remedy — must be in its nature conclusive and final. Whenever and wherever a judicial tribunal is authorized to pass upon any matter or right, and it does pass upon it, it must be regarded *res adjudicata*, subject only to be reversed on error. The United States, in harmony with its duty, has, in many instances, authorized the judiciary to determine controverted questions between the citizen and the government. Some of those cases are submitted, for the purpose of analogy, and for the deductions which they afford in aid of the construction,

which will be relied upon, of the statutes which must control the present case.

4 Stat. at Large, 284, May 23, 1828, ch. 70, § 6. In which provision is made, that private land claims in Florida, not finally settled by the commissioners, may be decided by the judge of the Superior Court for the district within which the lands are, provided the claims shall have been previously presented for allowance to the commissioner, register, or receiver. Sect. 7 provides an appeal to the Supreme Court of the United States. Sect. 13, that the decisions shall be final between the United States and the claimant. Under this statute, an appeal in one case was taken to this court, but dismissed, because the original application was not made within the time prescribed. United States *v.* Marvin, 3 Howard, 620. The power of the court to pass a valid decree upon a proper application was not doubted.

3 Stat. at Large, 691, May 7, 1822, ch. 96. An act to empower the city of Washington to drain the public grounds. In sect. 6 it is provided, that the proprietors may institute a bill in equity in the nature of a petition of right, against the United States, in the Circuit Court. Sect. 8, suits to be conducted according to the rules of courts of equity. Sect. 9, an appeal may be taken to the Supreme Court, and if no appeal, the judgment of Circuit Court to be final. Van Ness *v.* City of Washington and United States, 4 Peters, 232, is a case under this statute. On page 266, Mr. Taney, *arguendo*, says: "It submits their rights to judicial decision. In submitting to such a trial and decision they (the government) place themselves on the ground of contract, and waive any rights their sovereignty might give. For it would be absurd, indeed, to suppose that the United States gave to the court the mere power of hearing a cause, when that hearing could produce no judicial result." The court, Mr. Justice Story giving the opinion, say: "It is not necessary to consider whether the bill is so framed as to enable the court to pass a definitive decree against the United States"; thus by implication admitting the power of the court to pass a binding decree in a proper case. Passing from these general considerations, I submit, —

I. The verdict and judgment of the court thereon, in the Circuit Court of Pennsylvania, in the suit United States *v.* James Reeside, is a legal adjudication that the United States, at the time of its rendition, were indebted to him in the sum therein named, the validity of which is not open to contestation, except upon writ of error; that plaintiff is now entitled to have an entry to his credit, of the amount so decreed, upon the books of the Treasury Department.

This position results in an inquiry into the extent of the jurisdiction of the Circuit Court of Pennsylvania. I submit that the court had jurisdiction to pass, with the aid of the jury, upon all claims presented by Reeside, which he had previously exhibited to the proper department, and which had been by such department disallowed. The jurisdiction may be sustained upon two grounds:—

1st. The court rightfully exercised jurisdiction under a provincial statute of Pennsylvania, passed in 1705, known as the Defalcation Act. This act says: "If it appears to the jury that the plaintiff is overpaid, then they shall give in their verdict for the defendant, and withal certify to the court how much they find the plaintiff to be indebted, or in arrear to the defendant more than will answer the sum or debt demanded, and the sum or sums so certified shall be recorded with the verdict, and shall be deemed as a debt of record. And if the plaintiff fail to pay, defendant for recovery shall have *scire facias*, and have execution for the same with costs of that action." Has this act been adopted by the Circuit Court of the United States within the District of Pennsylvania, or by the Judiciary Act of the United States? If so, has it been adopted in, or can it be applied to, cases in which the United States are a party? In suits between citizens litigating in the Circuit Court of Pennsylvania, there can be no doubt it is obligatory. If not applicable to cases in which the United States are parties, such result follows from one of two causes;—first, the United States are not bound by State statute, or by any statute, unless specially named; second, because the court had no power to issue execution against the United States; in other words, no part of this act is applicable, because some of its provisions may not be. The first can have no influence, because the United States, when it voluntarily becomes a suitor in any court, must submit, and does submit, to the same rules and mode of proceeding which apply to any other suitor. The practice and rules of the court constitute the law of the court. The government or sovereign, when a suitor, is bound by the same rules of evidence as any other suitor, unless there is some statute provision to the contrary, except in some matters of presumption, not applicable to this inquiry. These principles are sustained by the reasoning of the court in the case of King of Spain *v.* Hullet et al., 1 Clark & Finnelly, 333, which was a suit brought by a foreign sovereign in his political capacity. The court held he was bound by the rules and practice of the court which were applicable to ordinary suitors, and like them was held to answer a cross-bill personally, and upon oath. As to the second supposed reason, the ina-

bility of the court to issue execution or *scire facias* against the United States, it does not follow that the right cannot be determined because there is no remedy, or a different one than that prescribed by the act. That this act was regarded by the Circuit Court as one of its modes or rules of proceeding, adopted by rule or long practice, or as embraced in the Judiciary Act, adopting the course of proceedings of the several State courts, is apparent from the record exhibited in the printed case. I do not, however, consider it of any consequence whether this colonial act is applicable or not.

2d. The jurisdiction of the Circuit Court of Pennsylvania is sustained and conferred by statutes of the United States. It will be admitted, I presume, that the Circuit Court had a right to pass upon some of the items which James Reeside set up. It must be granted, I suppose, that, so far as the court and jury rightfully passed upon any items of credit claimed, the adjudication is conclusive, and cannot be again a proper subject of contestation as to the question of right. Items thus allowed become debts of record. The accounting officers of the government are bound to pass upon all claims presented to them, without reference to the number or amount of the debits of the government against the party applying. If a suit is subsequently instituted by the United States against a supposed debtor, he has a right to present, for the consideration of the court and jury, all items for which he had previously claimed a credit at the department, without any reference to the number or amount of the debits against him. There is and can be no other limit, so far as the right is concerned. After the decision of the court and jury, the items allowed by them go to the credit of the party upon the books of the department; they constitute credits, if I may so say, judicially placed upon the books of the department, and when thus placed there by the decree of the court to which they had been referred, they cannot be erased, but must be considered as definitely settled. I now proceed to inquire whether these views are sustained by the statutes, and to what extent they authorize the court to adjudicate upon credits claimed by a defendant, against whom the United States have instituted a suit.

1 Stat. at Large, 65, Sept. 2, 1789, ch. 12, is an act to establish the Treasury Department by the third section of which the comptroller shall direct prosecutions for debts that are or shall be due to the United States. By the sixth section it is made the duty of the register to keep an account, &c., of all debts due to or from the United States.

1 Stat. at Large, 73, Sept. 24, 1789, ch. 20. The Judiciary Act, the eleventh section of which authorizes the Circuit Courts

to entertain jurisdiction where the United States may be a party. There can be no reasonable intendment or presumption, that the jurisdiction thus conferred is not, when exercised, conclusive and final as to the right contested; on the other hand, such must be the effect.

1 Stat. at Large, 441, March 3, 1795, ch. 48 (repealed). This statute provides for the settlement and ascertainment of a certain class of debts due to the government. The officers intrusted to act are to decide, upon principles of equity, upon all claims made, — not merely upon an amount sufficient to absorb the government debits, — and the decision is made final. Upon the same principle, it is submitted that, in cases where recourse to the judiciary is permitted, the decision must be upon all claims which the party has a right to make, in the absence of any provision to the contrary, and the decision should be regarded as final. It would be mere mockery to authorize the judiciary to examine and adjudicate upon a matter, unless such adjudication is to be final.

1 Stat. at Large, 512, March 3, 1797, ch. 20. This act provides for the settlement of accounts between the United States and receivers of public money. It is all accounts, — not so many, and so many only, as shall equal the debits. The fourth section authorizes the court to pass upon all items of credit which have been presented to the Treasury Department, and there disallowed. No other limit.

3 Stat. at Large, 366, March 3, 1817, ch. 45, § 2, provides that all claims and demands whatever, by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be adjusted and settled in the Treasury Department.

3 Stat. at Large, 592, May 15, 1820 ch. 107, § 4. Certain officers are authorized to determine certain claims, and issue warrants to enforce payment; in which case an appeal is allowed to the judiciary. The eighth section of this act requires the clerks of the District and Circuit Courts, at the close of each term, to return to the proper officer a list of all judgments and decrees during the term, to which the United States are parties, showing the amount which has been so adjudged or decreed for or against the United States. From this provision it is apparent that the jurisdiction of the court is not all on one side, it may pass a judgment or decree against the United States. It may pass upon all claims previously rejected by the department.

3 Stat. at Large, 770, March 1, 1823, ch. 37, § 1. This statute authorizes certain accounts, in relation to which there are no vouchers, to be settled upon equitable principles, by the ac-

counting officers, provided the amount allowed shall not exceed the debits. This is the only statute which confines and limits the amount of credits which may be allowed to the amount of the debits. The reason of the distinction is obvious, — the accounts are to be adjusted upon equitable principles, and without requiring vouchers.

4 Stat. at Large, 414, May 29, 1830, ch. 153, § 6. The Solicitor of the Treasury is required to report to the proper officer all credits allowed by due course of law on any suits under his direction. There does not seem to be any doubt as to the extent of credits which, under this statute, may be allowed by due course of law; all credits disallowed by the accounting officer may be set up by a party sued by the United States, and if proved, allowed, and thereupon be reported as credits thus allowed.

4 Stat. at Large, 563, July 5, 1832, ch. 173. Certain judgments against the State of Virginia to be paid by the United States. In the third section the Secretary of the Treasury is authorized to pay claims where no judgment has been recovered, upon the same principles which the court had adopted in the cases before it; thus reposing confidence in the judgments of the court. As to the correctness of the judgments rendered, the United States, although not parties, make no question or revision.

5 Stat. at Large, 80, July 2, 1836, ch. 270, Post-Office Department. The fifteenth section of this act provides that no claim for a credit shall be allowed upon any trial, except such as shall have been presented to the auditor, and shall have been disallowed. In other words, every claim thus exhibited and disallowed, in the event of a suit against the party, shall be adjudicated by the court. Here is no limit as to the amount which the court may allow.

I have thus shown that the Circuit Court had jurisdiction to adjudicate upon the credits which James Reeside claimed in the litigation between him and the United States.

I now proceed to show that the credits allowed in this way, by due course of law, are to be placed upon the books of the department to the credit of the party making them.

1 Stat. at Large, 433, March 3, 1795, ch. 45, § 3 (obsolete), which provides that credits for loan of money to the government shall be entered upon books of the Treasury Department.

1 Stat. at Large, 441, March 3, 1795, ch. 48, § 2. Provision is made for the adjustment of debts due to and from the United States, and when claims are allowed in the mode prescribed, credit is to be passed therefor upon the public books of account.

3 Stat. at Large, 592, May 15, 1820, ch. 107, § 7. It is the duty of the district attorneys to conform in all suits to the directions of the agent of the Treasury. And immediately at the end of each term of the court within their district, to forward to the agent of the Treasury a statement of the cases, and their disposition, in which the United States are a party. The eighth section requires the clerks to make returns to the agent of the Treasury, with a list of all judgments and decrees, in cases to which the United States may be a party, showing the amount which has been so adjudged or decreed for or against the United States.

4 Stat. at Large, 414, May 29, 1830, ch. 153, § 2. Returns to be made to the solicitor instead of the agent of the Treasury. The fifth section authorizes the solicitor to control all suits in which the United States may be a party. By the sixth section he is required to report to the proper officer all credits, allowed by due course of law, on any suits under his direction.

5 Stat. at Large, 80, July 2, 1836, ch. 270, Post-Office Department, § 16, requires the district attorney to forward to the auditor of the Post-Office Department a statement of all judgments, &c., in suits growing out of that department. These statutes clearly show the jurisdiction of the Circuit Courts, and that all credits allowed shall be entered upon the proper public books to the credit of the party making them.

I submit that the construction of these statutes which I have suggested has been confirmed and uniformly acted upon by the courts. I do not say the position has been presented in express terms, as now presented, but it is a necessary implication from the course of adjudication which has been pursued. Defendants in suits brought by the United States have often relied upon a claim for credits in amount exceeding the debits, and no counsel or court has objected to the consideration of them.

United States *v.* Giles, 9 Cranch, 212. In this case, the limit assumed by counsel for the government was to debits which had been disallowed by the accounting officers.

United States *v.* Wilkins, 6 Wheat. 135. Not merely legal, but equitable claims, are to be allowed to debtors of the United States, by the proper officers. No limit is made to the nature or origin of the claim for a credit, although it was not connected with the claim sought to be recovered by the government. The court refer to the act of March 3, 1797, and say, the object of the act seems to be to liquidate and adjust all accounts between the parties, and to require a judgment for such sum only as is equitably due from the defendant. In this case the mind of the court was not directed to a case in which a

balance might be due the defendant, which circumstance is not sufficient to change and confine the construction of the statute to such case as was before the court. If so, the great object of the statute, which is a liquidation and adjustment of all accounts between the parties, would be defeated. So, also, it would result, in those cases where suit is brought, if the view presented is not sound, that the power of the court is less than that of the accounting officers, from whose decision the institution of a suit is in effect, although not in form, an appeal.

Walton *v.* United States, 9 Wheat. 651. In which the court say, if any item of defendant's account has been improperly rejected by accounting officer, it is to be restored to his credit.

Van Ness *v.* City of Washington and United States, 4 Peters, 232.

Ex parte Watkins, 3 Peters, 193. In which the court say a judgment in its nature concludes the subject on which it is rendered.

Hunter *v.* United States, 5 Peters, 185. The same rules of contract are applicable where the sovereign is a party, as between individuals. The court make a distinction, where the government is concerned, between the right and the remedy.

United States *v.* Nourse, 6 Peters, 470. The court below found a balance due the defendant.

United States *v.* Nourse, 9 Peters, 8. The judgment between the parties in 6 Peters was held conclusive.

United States *v.* Arredondo, 6 Peters, 711, 715, 719. When the United States consent to be sued, and submit to judicial action, the rights of the parties to be determined upon the same principles as between man and man.

United States *v.* Dunn, 6 Peters, 51; United States *v.* McDaniel, 7 Peters, 1; United States *v.* Ripley, 7 Peters, 18; United States *v.* Fillebrown, 7 Peters, 28; United States *v.* Percheman, 7 Peters, 51. No limit of the jurisdiction of the court to items equal in amount with the debits was suggested.

United States *v.* Jones, 8 Peters, 375. Court say, the defendant may retain the credits allowed, may deny the debits, and claim credits disallowed; thus making no distinction as to the right of the party, depending upon the state of accounts between him and the government.

United States *v.* Hawkins, 10 Peters, 125. Claims exceeding the debits were passed upon without objection.

United States *v.* Bank of Metropolis, 15 Peters, 377. "When United States becomes party to a negotiable instrument, it has all the rights and incurs all the responsibilities of individuals who are parties to such instruments. There is no difference, ex-

cept that the United States cannot be sued. But if the United States sue, and the defendant holds its negotiable paper, the amount of it may be claimed as a credit, if after presentation to the accounting officer it has been disallowed, and it should be allowed by a jury as a credit against a debt claimed by United States." Suppose a suit in which the United States present a claim for five thousand dollars, and the defendant exhibits a valid bill of exchange for ten thousand dollars, upon which the government are liable, upon what part of this bill are the court to pass? for how much is he to have credit upon the public books? I submit, that the adjudication of the court must extend to the whole amount of the bill.

Gratiot *v.* United States, 4 Howard, 80–110. In this case defendant claimed a balance, and no objection was made to a consideration of all the items.

Bigelow *v.* Folger, 2 Metcalf, 256. "When a defendant, in a suit by an administrator of an insolvent estate, files in set-off a claim larger than the one on which he is sued, he is entitled to judgment for the balance. The judgment is to be certified to the judge of probate, and by him added to the list of claims."

Peck *v.* Jenness, 7 Howard, 612. The court rendered a special judgment, to accomplish its jurisdiction, to protect the rights of the parties.

Voorhees *v.* Bank of United States, 10 Peters, 449. Every act of a court must be presumed to have been rightly done until the contrary appears. Lytle *v.* State of Arkansas, 9 Howard, 333; Statutes of 1845–46, ch. 90, p. 59.

II. Assuming the Circuit Court of Pennsylvania had jurisdiction to pass upon all items which had been disallowed, and that the credits thus allowed must be passed to the credit of James Reeside upon the public books, as having been put there by due course of law, is the remedy of the plaintiff (assuming for the present she has a remedy) against the Secretary of the Treasury, or against the Postmaster-General, in whose department the claim had its origin?

3 Stat. at Large, 366, March 3, 1817, ch. 45, § 2. "All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or creditors, shall be adjusted and settled in the Treasury Department."

This *primâ facie* points out the place of adjustment, and must be so regarded until the contrary is shown. This adjustment and settlement means liquidation, payment. The words must be construed with reference to the subject-matter and purpose to be accomplished; the provision was not mere-

ly to ascertain the amount of indebtment of the government. It may be said that this has no application to contracts originating in the Post-Office Department. Be it so; a more recent statute settles the matter.

5 Stat. at Large, 80, July 2, 1836, § 6. By this statute, the Treasury is to pay debts of Post-Office Department. 5 Stat. at Large, 732, March 3, 1845, ch. 43, § 22.

III. Assuming the amount due Reeside, as found by the court and jury, must be put to his credit on the books of the Treasury Department, has the plaintiff any remedy? and if so, is it by mandamus?

If the views are correct which have been presented, the amount due Reeside must be regarded as a debt of record; as a debt judicially ascertained, and no longer open to contestation. The Secretary of the Treasury has no discretion as to the amount due, or as to the propriety of putting the credits upon the books. It is then like any other debt which is to be paid. Formerly, many debts were paid by the commissioners of loan; afterwards, by the United States Bank. Now, all debts are to be paid by the Secretary of the Treasury.

1 Stat. at Large, 65, September 2, 1789, ch. 12; 1 Stat. at Large, 512, March 3, 1797, ch. 20; 5 Stat. at Large, 80, July 2, 1836, ch. 270, § 10; 5 Stat. at Large, 752, March 3, 1845, ch. 71, § 4, which provides that accounts settled at the Treasury Department shall not be opened. The last-cited statute also provides that the accounting officers shall not pass upon claims not presented within six years.

5 Stat. at Large, 112, July 4, 1836, ch. 353, § 10, by which the Secretary of the Treasury is authorized and directed to pay, out of any money in the treasury not otherwise appropriated, any outstanding debts of the United States, and the interest thereon. I submit that an account settled by the court, in cases where the United States bring suit, and the result entered upon the books, must be regarded as closed, and as a debt to be paid.

Stat. of 1846–47, 123, February 9, 1847. The Secretary of the Treasury is to pay interest on all the public debt authorized by law. This includes debts of every description, without reference to their origin.

It may be said that the suit was not instituted within six years, and is therefore barred. Such defence was not set up in the court below, and cannot be set up, because the limitation of six years refers undoubtedly to the original claim to be made to the accounting officers. See statute already cited, March 3, 1845, ch. 71, § 4, and Stat. of 1845–46, May 7, 1846, ch. 13. Assuming that the party is entitled to remedy, is it by a man-

damus? I submit that such is the proper remedy, and the only remedy. Marbury *v.* Madison, 1 Cranch, 137; Kendall *v.* United States, 12 Peters, 524; Ferguson *v.* Kinnoul, 9 Clark & Finnelly, 251; The King *v.* Commissioner of Treasury, 5 Nev. & Mann. 589; Kendall *v.* Stokes, 3 Howard, 87.

The case of Kendall *v.* United States is a direct, and, as is supposed, conclusive authority. In that case a statute directed a particular claim to be adjusted in a particular mode; that the debt, when so ascertained, should be paid. In the case before the court, the claim of the party has been adjusted and adjudicated in a mode pointed out by general statutes applicable to a class of cases, and such adjustment has resulted in a fixed, certain debt, in relation to which no discretion remains. This debt, like any and all other debts, is directed by general statutes, which require the settlement and adjustment of claims, to be paid. The cases of Decatur *v.* Paulding, 14 Peters, 497, and Brashear *v.* Mason, 6 Howard, 92, do not conflict. They may well be distinguished from the case before the court. Rex *v.* Nottingham Old Water Works Company, 1 Nev. & Perry, 493. Coleridge, Justice, says, two things must conspire to authorize a mandamus: a specific legal right, and the absence of an effectual and efficient remedy for the encroachment of that right.

Whether there is any money in the treasury, or appropriation with which to pay, cannot arise until the objection is taken in the court below.

In the court below, the court dismissed the application without going much into the reasons. Their judgment was put upon two grounds;—that no specific appropriation had been made; that there was no special law directing its payment. When the original contracts were made with the Post-Office Department, appropriations were made to meet them; and, by subsequent legislation, the debts of the Post-Office are to be paid by the Treasury; so, where there is a general law directing the adjustment and payment of debts, there is no occasion for a special act to direct their payment. The Secretary is not charged with discretion in the one case any more than in the other. The court below refer for their reasons to an opinion given by them in McElrath *v.* McIntosh. The cases are entirely dissimilar. In that case the validity of a power of attorney was to be determined; the claimant under the power of attorney did not stand upon the public books as a creditor of the government. A most appropriate answer to the application in that case might have been given in a single word;—a claim against the sovereign cannot be assigned except with his consent, express, or, as in the case of bills of exchange, to

which he is a party by implication. The opinion of the court below in these two cases may be seen in Law Reporter, Boston, pp. 399 and 448, Vol. I. new series.

By the statute of July 2, 1836, ch. 270, already cited, the funds of the Post-Office Department are transferred to the Treasury; the suits are to be under the guidance of the Treasury, and all future appropriations paid by it. This must be regarded as a transfer of the former appropriations made from year to year, for the services which Reeside performed during their performance.

By the statute of March 3, 1845, ch. 43, § 22 (5 Stat. at Large, 732), it is provided, that, if the postage received under the act, in addition to an annual appropriation of $ 750,000, is not sufficient to meet the expense of the department, the deficiency shall be paid from any money in the treasury not otherwise appropriated. To confine this provision to the expenses of the department which might accrue after the passage of the act, would not be in accordance with the faith or duty of the government; such limited construction is not required by the language or purpose of the statute.

In conclusion, as the result of the statutes and authorities relied upon, it is submitted, that James Reeside, when sued by the United States, had a right to present for adjudication; that the court had jurisdiction to adjudicate upon every claim which had been previously made to, and disallowed by, the proper department; that the sum allowed to him by the court should have been, and no doubt was, at the time, certified to the proper department; that thereupon it should have been, and now should be, entered to his credit upon the public books of account, as a debt due from the United States to him, in relation to the correctness or fitness of which the accounting officers have no longer any discretion; and although the debt originated in the Post-Office Department, by force of statutes now in existence, it should be paid by the Treasury Department; the duty of the department is merely ministerial.

Mr. Crittenden made the following points

1st. That the said Circuit Court for the Eastern District of Pennsylvania had no power or jurisdiction to render judgment against the United States for the said sum of $ 188,496.06, or for any amount, and that their said judgment is, therefore, null and void. The sovereign power is subject neither to suit nor judgment in its own courts, unless by its own consent, and in this country that consent can only be given by law. Judiciary Act of 1789, § 11 (1 Stat. at Large, 78); 1 Black. Comm. 266

to 269; 3 Story on the Constitution, 154; Briscoe *v.* Bank of the Commonwealth of Kentucky, 11 Peters, 321; U. States *v.* Hoar, 2 Mason, C. C. 311.

2d. That, if said judgment be valid and binding, there can be no reason why the same judicial power that could render it may not enforce it by the ordinary process of execution; and therefore there can be no occasion for the extraordinary writ of mandamus, which can be legally resorted to only where there is no other remedy. Marbury *v.* Madison, 1 Cranch, 62 *et seq.*

3d. That if any force or virtue can be ascribed to said judgment, (we think none can,) by analogy to the orders or decrees of English chancellors upon petitory proceedings before them against the crown, it must follow, from the same analogy, that the judgment, like those decrees, is persuasive merely, not compulsory, and therefore most certainly not to be enforced by mandamus. 1 Black. Comm. 241, 242.

4th. The writ of mandamus can be properly issued to a public officer only to compel him to perform a certain act which he is directed by law to do; an act ministerial, and not involving the exercise of any discretion.

There is no law which directs the Secretary of the Treasury to enter on the books of the Treasury a credit to James Reeside for the amount of this judgment, or to pay the same to the petitioner; and she cannot, therefore, be entitled to the mandamus for which she prays. Marbury *v.* Madison, 1 Cranch, 62; Postmaster-General, &c. *v.* U. States, on the relation of Stokes, 12 Peters, 524.

5th. It does not appear that Congress have, in any way, recognized this judgment, or their obligation to pay it, or that they have made any appropriation for its payment, and therefore the mandamus prayed for ought not to be issued. Constitution, art. 1, § 9 (1 Stat. at Large, 15).

Mr. Justice WOODBURY delivered the opinion of the court.

This was a writ of error, brought to reverse a judgment in the Circuit Court for the District of Columbia, dismissing a petition for a writ of mandamus.

The mandamus was asked for by the plaintiff, as executrix of James Reeside, to direct the defendant, as Secretary of the United States Treasury, to enter on the books of the Treasury Department to the credit of said James the sum of $ 188,496.06, and pay the same to the plaintiff as his executrix. The grounds for the petition, as set out therein, were, that the United States had sued Reeside in the Circuit Court of the United States for the Eastern District of Pennsylvania, on certain post-office

contracts, and on the 22d of October, 1841, he pleaded a large set-off, and the jury, on the 6th of December ensuing, returned a verdict in his favor on the several issues which had been joined, and certified that the United States were indebted to him in the sum of $188,496.06; and that on the 12th day of May, 1842, final judgment was rendered in his favor on this verdict, which has never been paid, but still remains in full force.

On an examination of the record, the first objection to the issue of a mandamus seems to be, that no judgment appears to have been given, such as is set out in the petition, in favor of Reeside for the amount of the verdict.

Certain minutes were put in of the proceedings in that suit, beginning with the writ in 1837, including the verdict, and coming down to May 12, 1842, when it is said, "New trial refused, and judgment on the verdict."

But these seem to be the mere waste docket minutes, from which a judgment or a record of the whole case could afterwards be drawn up. They do not contain a judgment *in extenso*, nor are they a copy of any such judgment. But if, by the laws or practice of Pennsylvania, these minutes may be used instead of a full record, it is difficult to see a good reason for allowing them to control the forms and the principles of the common law applicable to them in the courts and records of the United States; and certainly they could not, unless private rights were involved in having them thus considered, so as to come under the 34th section of the Judiciary Act (1 Stat. at Large, 92). Or unless, as a matter of practice, it was well settled in this way as early as the process law of 1789. (See 1 Stat. at Large, 93.)

But without going into this point further,—means to do it not having been furnished by the petitioner, who relies on it, and was therefore bound to furnish such means,—there is another objection to it paramount to this, and sufficient for barring its use to support the present proceeding. In a case like this, in Pennsylvania, where a set-off is pleaded and a balance found due to the defendant, the judgment entered, if well proved by such minutes, is not, as the petitioner supposes, that the United States was indebted to Reeside in the amount of the verdict and should pay it; but it merely lays the foundation for a *scire facias* to issue, and a hearing be had on that if desired. (Penn. Laws by Dunlap, ch. 20, § 2.) The petitioner and her husband have neglected to pursue the case in that way to a final judgment, and hence have offered no evidence of one, on the verdict of indebtedness to Reeside by the United States. The judgment so far as regards that action would be, when no *scire facias*

was sued out, that the defendant go without day; and so these minutes should be drawn up, when put in a full and due form.

In Ramsey's Appeal, 2 Watts, 230, Ch. J. Gibson explains this fully. "The reference," says he, "was under the act of 1705, by the first section of which the jury are directed, when a set-off has been established for more than the plaintiffs demand, to find a verdict for the defendant, and withal certify to the court how much they find the plaintiffs to be indebted or in arrear to the defendant. The certificate thus made is an appendage to the verdict, but no part of it or of the premises on which the judgment is rendered; for the judgment is not *quod recuperet*, but that the defendant go without day. On the contrary, it is expressly made a distinct and independent cause of action by a *scire facias;* and though a debt of record, it is not necessarily a lien, as was shown in Allen *v.* Reesor, 16 Serg. & Rawle, 10, being made so only by judgment on a *scire facias*."

The gist of the prayer for a mandamus, therefore, fails. Because, though this application is in form against the person who was Secretary of the Treasury, November 4th, 1848; yet it is to affect the interests and liabilities alleged by the plaintiff herself to exist on the part of the United States.

Furthermore, the judgment sought to be paid is one claimed to have been rendered in form, as well as substance, against the United States.

Now, under these circumstances, though a mandamus may sometimes lie against a ministerial officer to do some ministerial act connected with the liabilities of the government, yet it must be where the government itself is liable, and the officer himself has improperly refused to act.

It must even then be in a case of clear, and not doubtful right. Kendall *v.* United States, 12 Peters, 525; Life & Fire Ins. Co. *v.* Wilson's Heirs, 8 Peters, 291. But here, as no judgment of indebtedness existed against the United States, the whole superstructure built on that must fall.

To save future expense and litigation in this case, with a view to obtain the desired judgment, it seems proper to make a few remarks on the other objections to the mandamus, resting on other and distinct grounds.

A mandamus will not lie against a Secretary of the Treasury, unless the laws require him to do what he is asked in the petition to be made to do. But there is no law, general or special, requiring him either to enter such claims as these on the books of the Treasury Department, or to pay them.

The general statutes, cited by the counsel for the petitioner,

in no case require the Secretary to enter claims like these on his books, or to pay them, when there has been no appropriation made to cover them. This last circumstance seems overlooked by the plaintiff, or sufficient importance is not attached to it, and it will be further considered before closing.

Nor is any special law pretended directing the entry of this claim on the books, or the payment of it either before or after entry. The case of Kendall *v.* United States, 12 Peters, 524, was one of a special law regulating the subject.

Again, a mandamus, as before intimated, is only to compel the performance of some ministerial, as well as legal duty. Kendall *v.* United States, 12 Peters, 524; Rex *v.* Water-works Company, 1 Nev. & Perry, 493.

When the duty is not strictly ministerial, but involves discretion and judgment, like the general doings of a head of a department, as was the respondent here, and as was the case here, no mandamus lies. Decatur *v.* Paulding, 14 Peters, 497; Brashear *v.* Mason, 6 Howard, 92.

It is well settled, too, that no action of any kind can be sustained against the government itself, for any supposed debt, unless by its own consent, under some special statute allowing it, which is not pretended to exist here. Briscoe *v.* Kentucky Bank, 11 Peters, 321; 4 Howard, 288; 9 Howard, 389.

The sovereignty of the government not only protects it against suits directly, but against judgments even for cost, when it fails in prosecutions (4 Howard, 288).

Such being the settled principle in our system of jurisprudence, it would be derogatory to the courts to allow the principle to be evaded or circumvented.

They could not, therefore, permit the claim to be enforced circuitously by mandamus against the Secretary of the Treasury, when it could not be directly against the United States; and when no judgment on and for it had been obtained against the United States.

As little also would be the propriety of allowing by *scire facias*, or otherwise, a judgment to be entered against the United States on a set-off, when it could not have been allowed in an action against them on the subject-matter of the set-off.

To permit a demand in set-off against the government to be proceeded on to judgment against it, would be equivalent to the permission of a suit to be prosecuted against it. And however this may be tolerated between individuals, by a species of reconvention, when demands in set-off are sought to be recovered, it could not be as against the government except by a mere evasion, and must be as useless in the end as it would be

derogatory to judicial fairness. A set-off or reconvention is often to be treated as a new suit by the defendant, and the pleadings and judgment are to be made to correspond. (See Louisiana Code of Practice, 374, §§ 371 – 377.) In Perry v. Gerbeau and Wife, 5 Martin, N. S. 18, the court say, "The claim set up in the answer was one in reconvention, and too general. Such demands should have the same certainty as a petition."

It would present, also, the inconsistency of the officers of a government issuing precepts against it, and seizing and selling the property under their own charge and protection.

Or it would present the other alternative, of entering a judgment against a party which it could not enforce by execution, and which none of its officers had been authorized to discharge.

This last consideration is one of peculiar importance in this proceeding, and in the proper measures to be adopted under our political and fiscal system, as to a claim like this.

No officer, however high, not even the President, much less a Secretary of the Treasury or Treasurer, is empowered to pay debts of the United States generally, when presented to them. If, therefore, the petition in this case was allowed so far as to order the verdict against the United States to be entered on the books of the Treasury Department, the plaintiff would be as far from having a claim on the Secretary or Treasurer to pay it as now. The difficulty in the way is the want of any appropriation by Congress to pay this claim. It is a well-known constitutional provision, that no money can be taken or drawn from the Treasury except under an appropriation by Congress. See Constitution, art. 1, § 9 (1 Stat. at Large, 15).

However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion.

Hence, the petitioner should have presented her claim on the United States to Congress, and prayed for an appropriation to pay it. If Congress after that make such an appropriation, the Treasury can, and doubtless will, discharge the claim without any mandamus. But without such an appropriation it cannot and should not be paid by the Treasury, whether the claim is by a verdict or judgment, or without either, and no mandamus or other remedy lies against any officer of the Treasury Department, in a case situated like this, where no appropriation to pay it has been made. The existence of this other and ordinary mode of redress, by resort to Congress, may be another reason against a mandamus, as that lies only

when no other adequate remedy exists. Marbury v. Madison, 1 Cranch, 62 - 137; Kendall v. United States, 12 Peters, 525.

But, independent of this last consideration, which as a remedy may not come within the usual meaning of another remedy, the grounds for the petition are not sufficient, and the judgment below, dismissing it, must be affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

EX PARTE: IN THE MATTER OF EARLY BOYD, PLAINTIFF IN ERROR, v. WILLIAM SCOTT AND WILLIAM GREENE. — *In Error to the District Court of the United States for the Northern District of Alabama.*

A motion on the part of the defendants in error, for a rule upon the plaintiff in error to file a copy of the record, overruled.

MR. CRITTENDEN, of counsel for the defendants in error, having filed the following certificate, viz.: —

"*The United States of America, Northern District of Alabama.*

"In the District Court of the United States for the Northern District of Alabama, at Huntsville.

"I, Benjamin T. Moore, Clerk of the District Court of the United States for the Northern District of Alabama, at Huntsville, do hereby certify, that at the term of the District Court aforesaid, begun and held at the court-house in the town of Huntsville, in said district, on the fourth Monday in November, A. D. 1850, in a certain cause therein pending in said court, wherein Early Boyd was plaintiff, and William Scott and William Greene were defendants, judgment was rendered therein in favor of said defendants against said plaintiff, for the costs of suit, amounting to the sum of dollars, and that from the said judgment the said Early Boyd, on the 29th day of November, A. D. 1850, prayed and obtained a writ of error to the then next term of the Supreme Court of the Unit-

ed States, and on the day last aforesaid entered into bond in the penalty of one thousand dollars with Silas Parsons his security, payable to the said William Scott and William Greene, conditioned that, if the said Early Boyd should prosecute the said writ of error to effect, and should also pay and satisfy the judgment which shall be rendered in said cause by the Supreme Court of the United States, then the said obligation should be void, else remain in full force and virtue.

"In testimony whereof, I hereto subscribe my name and affix the seal of the said District Court, at office, in the town of Huntsville, in the District aforesaid, this the 24th day of January, A. D. 1851, and of the independence of the United States of America the seventy-fifth.

"B. T. Moore, *Clerk.*"

moved the court for a rule on the plaintiff in error, to file the record on or before the day of , and that on failure the case be dismissed. On consideration whereof, it is now here ordered by the court, that the said motion be, and the same is hereby, overruled.

Per Mr. Chief Justice Taney.

The State of Florida, Complainant, v. The State of Georgia.
Bill in Chancery.

A bill by the State of Florida against the State of Georgia ordered to be filed, and process of subpœna directed to be issued against the State of Georgia.

Messrs. Johnson and Westcott, solicitors for the complainant, moved the court for leave to file the bill of complaint in the cause and for a writ of subpœna, or such process as to the court may seem proper. Whereupon this court, not being now here sufficiently advised of and concerning what order to render in the premises, took time to consider.

On consideration of the motion made in this case yesterday, by the solicitors for the complainant, it is now here ordered by the court that this bill of complaint be filed, and that process of subpœna be, and the same is hereby, awarded, as prayed for by the complainant, and that said process issue against "The State of Georgia."

GEORGE W. PHILLIPS, PLAINTIFF IN ERROR, v. JOHN S. PRESTON.

A writ of error abated where the death of the plaintiff in error was suggested, and leave granted to make proper parties at December term, 1846, representatives not yet having been made.

THIS cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana. And it appearing to the court here that, upon the suggestion of the death of the plaintiff in error by his counsel, leave was granted by this court to make the representatives of the deceased parties at a prior term of this court, to wit, at December term, 1846, and that the proper representatives have not yet been made, it is thereupon now here ordered and adjudged by this court, that this writ of error be, and the same is hereby, abated, and that this cause be, and the same is hereby, remanded to the said Circuit Court, to be proceeded in according to law and justice.

SMITH HOGAN, ARTHUR S. HOGAN, AND REUBEN Y. REYNOLDS, PLAINTIFFS IN ERROR, v. AARON ROSS, WHO SUES FOR THE USE OF ROBERT PATTERSON.

Where a case was dismissed by this court for want of a citation, and the plaintiff in error sued out another writ, and applied to this court for a supersedeas to stay execution in the court below, the application cannot be granted.

This court is not authorized to grant a supersedeas unless the writ of error has been sued out within ten days after the rendition of the judgment, and in conformity with the provisions of the twenty-third section of the act of 1789.

The cases of Stockton and Moore v. Bishop (2 Howard, 74) and Hardeman v. Anderson (4 Howard, 640) explained.

THIS case was pending under a writ of error issued to the District Court of the United States for the Northern District of Mississippi.

The following motion and affidavit were filed by the counsel for the plaintiffs in error, viz.: —

"This case was depending before this court at its last term upon a writ of error, operating as a supersedeas, and was then dismissed because the record did not show that a citation had been issued and served on the defendant in error. Since the last term of this court, the plaintiffs have sued out another writ of error, executed another bond, filed a complete record of the

case, &c., but they are exposed to execution on the judgment in the court below; they therefore move the court for a supersedeas to stay all further proceedings on the judgment below.

"W. S. FEATHERSTON,
R. DAVIS,
Attorneys for Plaintiffs in error."

"Personally appeared before me, Wm. T. Carroll, Clerk of the Supreme Court of the United States, Winfield S. Featherston, who, being duly sworn, says that he is informed by R. Davis, of counsel for Smith Hogan et al. in the court below, that an execution has been issued on the judgment in this case, now before this court for revision and correction, from the District Court of the United States for the Northern District of Mississippi. That said execution is now in the hands of the marshal for the said Northern District of Mississippi, to be levied on the property of said Smith Hogan et al. and returned to the next June term of said District Court. This affiant further states, that he believes said information to be true.

"Sworn to in open court, this 11th February, 1851.

"WM. THOS. CARROLL."

Mr. Chief Justice TANEY delivered the opinion of the court.

A motion has been made in this case for a supersedeas to stay execution upon a judgment rendered in the District Court of the United States for the Northern District of Mississippi.

The judgment was rendered in December, 1847, and a bond was filed, and a writ of error lodged in the clerk's office, within ten days after the judgment; and the record was filed and the case docketed in this court near the close of December term, 1848. But no citation appeared to have been issued for the defendant in error; and upon that ground the writ was dismissed at December term, 1849. The act of Congress makes the citation necessary in order to remove a case to this court by writ of error.

In October, 1850, after that writ was dismissed, the plaintiff sued out and lodged in the clerk's office of the District Court another writ, returnable to the present term of this court, and gave another bond, and served a citation on the defendant in error to appear; and filed the record and docketed the case in this court. And it appearing by an affidavit filed that an execution has been issued by the defendant in error upon the judgment in the District Court, this motion is made to stay proceedings upon it, while the writ of error is pending in this court.

Upon the dismissal of the first writ of error, it ceased to be

a supersedeas, and the party who obtained the judgment in the District Court was undoubtedly at liberty to enforce it by execution, unless he is stayed by the second writ of error now pending. And the question presented by this motion is whether this writ is also a supersedeas. We think it is not. The act of 1789, ch. 20, § 23, in express terms declares that a writ of error shall be a supersedeas in those cases only where the writ is served by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, after rendering the judgment. The writ before us was not issued or lodged in the clerk's office for nearly two years after the judgment in the District Court. It cannot, therefore, operate as a supersedeas.

The cases relied on in support of the motion stand on different grounds. In Stockton and Moore *v.* Bishop, 2 Howard, 74, the bond was given and the writ of error filed and the citation issued within ten days after the judgment. The act of Congress, therefore, made it a supersedeas. And when the court in that case say that these proceedings were in due season, they are speaking of the time of filing them, by which they become a supersedeas by the act of Congress; and not of the time within which a writ of error may be brought to correct the errors in the judgment.

In the case of Hardeman *v.* Anderson, 4 Howard, 640, the original judgment, it is true, was rendered in 1839. But upon referring to the record, it appears that a controversy arose in the proceedings on the execution, which were continued from time to time until May 20th, 1844. On that day a judgment, or an order that was regarded as a judgment, was entered, to which an exception was taken; and it was upon this judgment or order that the first writ of error was sued out. The bond, writ, and citation were all within ten days from this last judgment. And the case was docketed and dismissed at the succeeding term (December, 1844), not on account of any irregularity or omission in these proceedings, but because the record had not been filed in this court.

In May, 1845, after this writ had been dismissed, the plaintiff sued out another writ of error, and gave bond, and regularly cited the defendant in error to appear; and filed the record and docketed the case at the beginning of December term, 1845. And the court being satisfied from the testimony offered that the omission to file the record at the preceding term arose from the neglect of the clerk of the District Court, and that the plaintiff was in no fault, it undoubtedly had the power to reinstate the case; and when reinstated it would stand in this court upon the first writ of error, and not upon the second.

The proceedings in relation to that writ were in due time, and when docketed in this court it stayed execution, by force of the act of Congress, while the case was here pending. And it was in this view of the case, that the court deemed it their duty to enforce the stay by awarding a supersedeas. It was upon this ground that the writ was issued, and not under the removal by the second writ of error; nor was it issued under the fourteenth section of the act of 1789, as would seem to have been the case, from some mistake or oversight in framing the orders and entries. For the court is unanimously of opinion, that, in the exercise of their appellate power, they are not authorized to award a supersedeas to stay proceedings on the judgment of the inferior court, upon the ground that a writ of error is pending, unless the writ was sued out within ten days after the judgment, and in conformity with the provisions of the twenty-third section of the act of 1789. And if the case of Hardeman v. Anderson had been considered as pending here by force of the second writ of error, no supersedeas could lawfully have been issued.

The case now before us was not brought up by the first writ for want of the citation. There is no ground, therefore, for reinstating the case in this court upon that writ. And the second writ, by which alone it has been brought here, and by virtue of which it is now pending, was not sued out in time to operate as a supersedeas; and this court have not the power to award one.

The motion must, therefore, be overruled.

Order.

On consideration of the motion made by Mr. Featherston for a writ of supersedeas in this cause, and the arguments of counsel thereupon had, as well against as in support thereof, it is now here ordered by the court, that the said motion be, and the same is hereby, overruled.

JEREMIAH VAN RENSSELAER, APPELLANT, v. PHILIP KEARNEY AND FREDERIC DE PEYSTER, TRUSTEES AND EXECUTORS OF JOHN WATTS, DECEASED, CATHERINE G. VISSCHER, CORNELIUS G. VAN RENSSELAER, AND GLEN VAN RENSSELAER, DEFENDANTS.

In 1786 the legislature of New York passed a law declaring that "all estates tail shall be, and hereby are, abolished"; and if any person should thereafter become seized in fee tail of any lands, tenements, or hereditaments by virtue of any devise, &c., he should be deemed to have become seized in fee simple absolute.

This included an estate tail in remainder, as well as one in possession. The courts in New York have so decided, and this court adopts their construction.

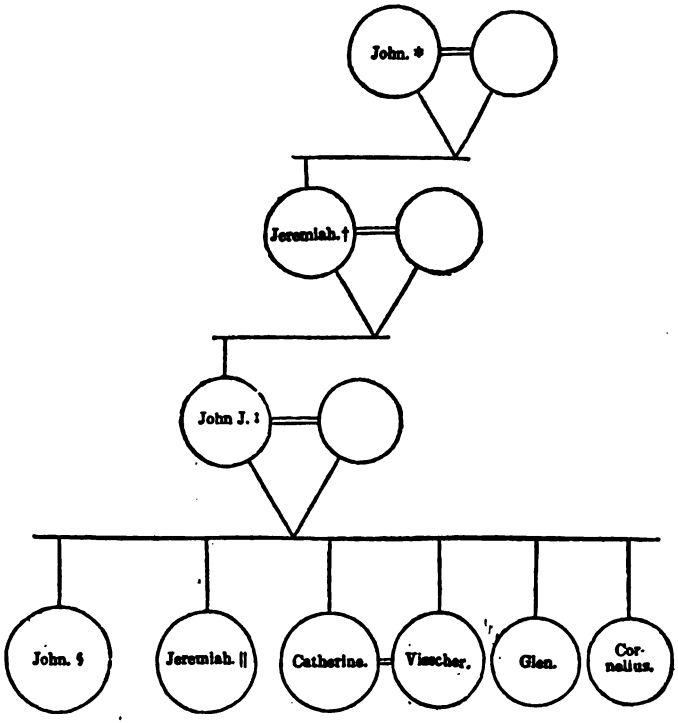
The remainder-man dying during the lifetime of the life tenant, the latter, being the father, inherited from the son a fee simple absolute.

Whilst the remainder-man was yet alive, the life tenant sold the property and conveyed it to the vendee by a deed which, according to its true construction, affirmed the existence of an estate in fee simple in itself. The reasons for this construction stated.

Those claiming under him are estopped by this deed. The doctrine of estoppel explained.

THIS was an appeal from the Circuit Court of the United States for the Southern District of New York, sitting as a court of equity. It was a bill filed by the appellant, Jeremiah Van Rensselaer, against John Watts originally, and continued against his trustees and executors, praying for an account of the rents of certain property, and for the surrender of the leases, title-deeds, &c.

In order to see at a glance the derivation of the title, the following table is referred to: —



* The testator, died 1783.
† Dead at the date of the will.
‡ The devisee, died 1828.
§ Born 1791, died 1813, without issue.
|| The complainant, born 1793.

On the 25th of May, 1782, John Van Rensselaer was seized of a large body of land, about thirty-four thousand acres, a part of which had been leased on permanent ground rents, and a part leased for life or for years. The residue was owned by him in fee simple. On that day he made and published his last will and testament, by which he devised Claverack Manor to trustees during the life of John J. Van Rensselaer, his grandson, with the intent to create an estate tail, the rents and profits to the use of John J. Van Rensselaer during his lifetime and the remainder over to the issue male of the said John, and in case of failure of such issue, then to the issue male of the other sons of the testator. Provision was then made for raising portions for female issue.

On the 12th of July, 1782, a law was passed in New York abolishing entails, and on the 29th of July, 1782, the testator added a codicil to his will, alluding to the law.

In 1783 the testator died, and John J. Van Rensselaer, the devisee, entered into possession of the estate.

On the 23d of February, 1786, the legislature of New York passed an act (3 R. S. N. Y., 1st ed., App. 48; 1 R. L. 1813, p. 52), declaring "That all estates tail shall be, and hereby are, abolished; and that, in all cases where any person or persons now is, or, if the act hereinafter mentioned [referring to the act passed on 12th July, 1782] had not been passed, would now be, seized in fee tail of any lands, tenements, or hereditaments, such person and persons shall be deemed to be seized of the same in fee simple absolute; and further, that in all cases where any person or persons would, if the said act and this present act had not been passed, at any time hereafter become seized in fee tail of any lands, tenements, or hereditaments, by virtue of any devise, gift, grant, or other conveyance heretofore made or hereafter to be made, or by any other means whatsoever, such person or persons, instead of becoming seized thereof in fee tail, shall be deemed and adjudged to become seized thereof in fee simple absolute."

In 1791 John was born, who was the first-born son of the devisee. It may as well be mentioned here, that he died in 1813, leaving his father surviving him. After John there were born other children, viz. Jeremiah, who was the complainant below and appellant here, Catherine, who intermarried with one Visscher, Glen, and Cornelius.

In 1794, the condition of the estate was this. Much the larger proportion of it was held under leases, which had been made to different persons at different times, and the residue was held by John J. Van Rensselaer. The leases were, some of them, executed by Hendrick Van Rensselaer and John Van

Rensselaer, the ancestors of the said John J.; and some executed by John J. Van Rensselaer himself. These leases for the most part created perpetual ground rents, and those which did not create perpetual ground rents were for the lives of the lessees. Two mortgages upon the property had also been given by John J. Van Rensselaer to Philip Schuyler, for three thousand one hundred pounds each.

This being the state of the property in 1794, John J. Van Rensselaer entered into an agreement with Daniel Penfield, on the 4th of November of that year. As these articles were much discussed in the argument, it is proper to make extracts from them as to those points which were the subject of discussion.

"Articles of agreement had, made, entered into, and finally concluded upon this fourth day of November, in the year of our Lord one thousand seven hundred and ninety-four, by and between John J. Van Rensselaer of Greenbush, in the county of Rensselaer, of the one part, and Daniel Penfield of the city of New York, of the other part, witnesseth: Imprimis, the said John J. Van Rensselaer, for himself, his heirs, executors, and administrators, doth covenant, grant, and agree, to and with the said Daniel Penfield, his heirs, executors, and administrators, that he, the said John J. Van Rensselaer, together with Catherine, his wife, shall and will, within the term of three months from the date hereof, by a good and sufficient deed and conveyance in the law, such as by the counsel of the said Daniel Penfield, his heirs or assigns, shall be reasonably advised, devised, or required, and that free and clear, and freely acquitted and discharged of and from all encumbrances and charges, other than leases heretofore given by the said John J. Van Rensselaer and his ancestors, assign, release, convey, assure, bargain, sell, grant, and confirm unto the said Daniel Penfield, his heirs and assigns for ever, all the right, title, interest, property, claim, and demand, either in possession, reversion, or remainder, of him, the said John J. Van Rensselaer and Catherine, his wife, of, in, or to all that tract and parcel of land situate, lying, and being in the town of Claverack, and city of Hudson, and county of Columbia, and included within the boundaries following, to wit, that is to say: Beginning," &c., (going on to describe the land,) "together with all and singular the waters, watercourses, and streams of water, profits, advantages, hereditaments, and appurtenances whatsoever thereunto appertaining and belonging, or which have been considered and used, or now are used and occupied, as part and parcel thereof, in as full and ample a manner as the said John J. Van Rensselaer now hath and enjoyeth the same, and in as

full and ample a manner as the same have heretofore been had and enjoyed by the said John J. Van Rensselaer, or lawfully may be had, used, occupied, possessed, and enjoyed by him, his heirs or assigns: To have and to hold the same unto the said Daniel Penfield, his heirs and assigns for ever, excepting, reserving, and saving thereout all the land included within the foregoing and above-described boundaries, which have been heretofore granted," &c. (going on to enumerate the leases made and agreed to be made).

Then followed covenants on the part of Penfield to pay for the quantity of land, to pay the mortgages to Schuyler, to secure the payment of the instalments by mortgage, to execute leases to the persons with whom John J. had agreed that leases should be made, and other covenants, which it is not material to state.

On the 1st of January, 1795, John J. Van Rensselaer and Catherine, his wife, executed the deed to Penfield, in conformity with the above articles. The deed is short, and, as many parts of it were criticized in the argument, it may be proper to insert it entire.

"This indenture, made the first day of January, 1795, between John J. Van Rensselaer, of the county of Rensselaer and State of New York, esquire, and Catherine, his wife, of the one part, and Daniel Penfield, of the city of New York, esquire, of the other part: Whereas certain articles of agreement, indented, were made and executed by and between the said John J. Van Rensselaer of the one part, and the said Daniel Penfield of the other part, bearing date the fourth day of November last past, in the words following, to wit: Imprimis, the said John J. Van Rensselaer, for himself, his heirs, executors, and administrators, doth covenant, grant, and agree, to and with the said Daniel Penfield, his heirs, executors, and administrators, that he, the said John J. Van Rensselaer, together with Catherine, his wife, within the term of three months from the date hereof, by a good and sufficient deed and conveyance in the law, such as by the counsel of the said Daniel Penfield, his heirs or assigns, shall be reasonably advised, devised, or required, and that free and clear, and freely acquitted and discharged of and from all encumbrances and charges other than leases heretofore given by the said John J. Van Rensselaer and his ancestors, assign, release, convey, assure, bargain, sell, grant, and confirm unto the said Daniel Penfield, his heirs and assigns for ever, all the right, title, interest, property, claim, and demand, either in possession, reversion, or remainder, of him, the said John J. Van Rensselaer,

and Catherine, his wife, of, in, or to all that tract and parcel of land, situate, lying, and being in the town of Claverack, and city of Hudson, in the county of Columbia, and included within the boundaries following, to wit, that is to say: Beginning at the mouth of Major Abraham's or Kinderhook Creek; thence running south eighty-four degrees and thirty-eight minutes east, ten miles; thence running south forty degrees west, as far as the right of John Van Rensselaer, the grandfather of the said John J. Van Rensselaer, extended; from thence to Wahankasick; and thence up Hudson River to the place of beginning; together with all and singular the waters, watercourses, and streams of water, profits, advantages, hereditaments, and appurtenances whatsoever thereunto appertaining or belonging, and which have been considered and used, or now are used and occupied, as part and parcel thereof, in as full and ample a manner as the said John J. Van Rensselaer now hath and enjoyeth the same, and in as full and ample a manner as the same have heretofore been had and enjoyed by the said John J. Van Rensselaer, or lawfully may be had, used, occupied, possessed, and enjoyed by him, his heirs or assigns: To have and to hold the same unto the said Daniel Penfield, his heirs and assigns for ever, excepting, reserving, and saving thereout all the land included within the foregoing and above-described boundaries, which have been heretofore granted by letters patent prior to the grants, patents, and confirmations under which the right and title of the said John J. Van Rensselaer is derived; excepting also all lands sold or granted otherwise than by lease by the late John Van Rensselaer, deceased, and the aforesaid John J. Van Rensselaer, and all the lands granted by lease from the said John Van Rensselaer, deceased, to Robert Van Rensselaer, situate, lying, and being in the said town of Claverack, in the county of Columbia; and excepting also the quantity of fifty acres of woodland, to be granted by the said Daniel Penfield to Henry J. Van Rensselaer, and situate within the boundaries before mentioned and described, and to be by them agreed on; and excepting, also, all that tract of land situate in the city of Hudson and town of Claverack, formerly devised by Hendrick Van Rensselaer to Henry Van Rensselaer, deceased; and excepting, also, the farm of land in possession of the representatives of Eytie Moore, deceased, and by the said John J. Van Rensselaer conveyed to John Van Rensselaer, which said deed shall be duly acknowledged by the said John J. Van Rensselaer and Catharine, his wife, pursuant to the act in such case made and provided, as in and by the said articles of agreement, relation being thereunto especially had, may among other things more fully appear.

"Now, therefore, this indenture witnesseth, that the said John J. Van Rensselaer and Catharine, his wife, for and in consideration of the sum of forty-four thousand five hundred and fifty dollars to them in hand paid, the receipt whereof they do hereby acknowledge, and therefrom release and discharge the said Daniel Penfield, his heirs and assigns, have granted, bargained, sold, aliened, enfeoffed, assured, released, and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, assure, release, and confirm, unto the said Daniel Penfield, (in his actual possession now being, by virtue of a bargain and sale to him thereof made for one whole year by the said John J. Van Rensselaer, by indenture bearing date the day next before the day of the date of these presents, and by force of the statute for transferring uses into possession,) and to his heirs and assigns for ever, all and singular the aforesaid tract of land above described, lying and being in the town of Claverack and city of Hudson, and so butted and bounded as is above particularly mentioned, together with all and singular the waters, watercourses, and streams of water, profits, advantages, hereditaments, and appurtenances whatsoever thereto appertaining and belonging, or which have been considered and used, or now are used and occupied, as part and parcel thereof, excepting, reserving, and saving thereout all the lands included within the foregoing and above-described boundaries, which are excepted, saved, and reserved in the said in part recited articles of agreement; which said tract of land, after deducting the said exceptions, reservations, and savings, contains the quantity of thirty-three thousand six hundred and fifty-eight acres of land, and the reversion and reversions, remainder and remainders, rents, issues, services, and profits thereof, and also all leases of and concerning any part or parts of the said granted premises; and also all the estate, right, title, interest, property, possession, claim, and demand of them, the said John J. Van Rensselaer and Catherine, his wife, of, in, and to the same: To have and to hold the said tract of land so described, and so butted and bounded as above recited, excepting, saving, and reserving, as are above particularly excepted, saved, and reserved, unto the said Daniel Penfield, his heirs and assigns, to the only proper use and behoof of the said Daniel Penfield, his heirs and assigns for ever, in as full and ample a manner as the said John J. Van Rensselaer now hath and enjoyeth the same, and in as full and ample a manner as the same hath heretofore been had and enjoyed by the said John J. Van Rensselaer, or lawfully might, if these presents were not made, be had, used, occupied, possessed, and enjoyed by him, his heirs or assigns. And the said John J. Van Rensselaer, for himself, his heirs, executors,

and administrators, doth covenant, grant, and agree, to and with the said Daniel Penfield, his heirs and assigns, in manner following, that is to say: that the said tract of land described, butted and bounded as aforesaid, excepting, saving, and reserving as above are excepted, saved, and reserved, is free and clear, and shall and may be held and enjoyed by the said Daniel Penfield, his heirs and assigns, according to the true intent and meaning of these presents, freely and clearly acquitted and discharged of and from all encumbrances and charges, other than leases heretofore given by the said John J. Van Rensselaer and his ancestors, or any of them, and except a certain mortgage upon the premises executed by the said John J. Van Rensselaer to Philip Schuyler, esquire, dated the 11th day of August, 1791, to secure the payment of three thousand one hundred pounds.

"In witness whereof the parties to these presents have hereunto interchangeably set their hands and seals, the day and year first above written.

"JOHN J. VAN RENSSELAER, [L. S.]
CATHERINE VAN RENSSELAER. [L. S.]"

On the 15th of October, 1806, Penfield and wife conveyed all the property to John Watts, enumerating in the deed all the leases, which were to stand good.

In 1813 John Van Rensselaer, the eldest son of John J., died, without issue.

On the 26th of September, 1828, John J. Van Rensselaer, who had sold the property to Watts, died also.

At some time previous to the year 1836, but when the record did not show, Jeremiah Van Rensselaer, a citizen of New Jersey, being the eldest surviving son of John J., filed his bill in the Circuit Court of the United States for the Southern District of New York, against John Watts, and against Catherine G. Visscher, Cornelius G. Van Rensselaer, and Glen Van Rensselaer. In the bill he alleged that all the estate and interest which John J. Van Rensselaer acquired under the will of his grandfather was an estate for his own life merely, and that the said John J. was unable to vest, and did not vest, any greater interest in Penfield. Claiming the whole estate, he called upon Watts for an account of the rents and profits, and for a surrender of the title papers.

As to his brothers and sister the bill proceeded thus:—

"Your orator further charges, that the said Catherine G. Visscher, Cornelius G. Van Rensselaer, and Glen Van Rensselaer, who are citizens of the State of New York, give out and pretend that the said John J. Van Rensselaer had a son named

John Van Rensselaer, who, as they allege, was born in the year 1791, and died in the year 1813; and they further allege, that upon his birth the said estate, devised to the eldest son of the said John J. Van Rensselaer in and by the said will, vested in the said John Van Rensselaer; and that, by the operation of law, it was turned into an estate in fee, and descended, upon the death of the said John Van Rensselaer, to the said John J. Van Rensselaer; and that upon the death of the said John J. Van Rensselaer, in the year 1828, it descended to his heirs at law as tenants in common, whereby, as they allege, they are each entitled to a fourth part of the said estate, and to the rents and profits accruing thereupon. Whereas your orator charges, that the said estate, and the rents and profits thereof, belong to him."

The bill then prayed that the complainant might be quieted in his title to the whole of the premises, or, in case it should be decided that he was entitled only to one fourth part, then that the court would decree accordingly.

The brothers and sister answered, admitting the facts stated in the bill, and submitting themselves to the judgment of the court.

Watts put in a plea, denying all knowledge of any title except that of Penfield at the time of his purchase, and prayed that he might not be compelled to answer further. The court allowed the plea to stand as to the discovery, but ordered a further answer as to the title.

In September, 1836, John Watts died, leaving Philip Kearney and Frederic De Peyster his executors. A supplemental bill and bill of revivor was then filed, making them parties, and also Philip Kearney, Jr., Susan Kearney, and John Watts De Peyster, the devisees of the property in question. The new parties answered, and sundry exhibits were filed and depositions taken. In May, 1846, the cause came on for argument in the Circuit Court, which passed the following decree. Judge Nelson being unable to attend from sickness, the decree was given by Judge Betts.

"First. That the remainder in tail, in the premises mentioned in the pleadings in this cause, created by the will of John Van Rensselaer the elder, vested in John, his great-grandson, on his birth, in the year 1791, and that said great-grandson was seized of such remainder.

"Second. That the tenant in tail under the said will, acquiring such estate in remainder, became thereby so seized of the lands, tenements, and hereditaments devised that the act of February 23d, A. D. 1786, converted such estate tail into a fee simple absolute.

"Third. That the said John, the great-grandson of the said John Van Rensselaer the elder, took the estate in question as a purchase, and thus became a new stock of descent, and was so seized thereof, that, at his death, in the year 1813, the whole estate descended to his father, John J. Van Rensselaer, and his heirs at law.

"Fourth. That the covenants in the deed of John J. Van Rensselaer, conveying the premises in question to David Penfield, bearing date the 1st day of January, A. D. 1795, amount in law to a covenant against all encumbrances, except such as are specifically designated in the said deed, and also to a covenant for quiet enjoyment, subject only to the like exceptions.

"Fifth. That the said covenants in the said deed operate as an estoppel to John J. Van Rensselaer's claiming the estate subsequently acquired by him, as against his grantee; and that the estoppel operates equally against the complainant in this suit, who makes title to the estate in question as one of the heirs at law of John J. Van Rensselaer.

"Sixth. That the deed of Daniel Penfield to John Watts, bearing date the 15th day of October, in the year 1806, conveying the said estate to the said John Watts in fee, with full covenants, entitles his devisees and representatives, now in possession of the premises, and who are defendants in this cause, to a decree dismissing the complainant's bill in this cause, with costs.

"It is therefore ordered, adjudged, and decreed by this court, that the complainant's said bill of complaint be, and the same hereby is, dismissed; and that the said complainant pay to the said defendants or their solicitor their costs of this suit, to be taxed, and that the said defendants have execution therefor according to the course and practice of this court.

(Signed,) SAMUEL R. BETTS."

The complainant appealed to this court. It was argued by *Mr. Webster* and *Mr. Blunt*, for the appellant, and *Mr. Jordan* and *Mr. Wood*, for the appellees.

The case was argued at great length, and the reporter can only state the points raised by the respective counsel.

On the part of the appellant, the points were the following.

In case the decision lately made by the New York court in Van Rensselaer *v.* Poucher is to be examined here, pursuant to the rule established in Lane et al. *v.* Vick et al., 3 Howard, 476, then the first question is, When was the estate tail created by the will converted into a fee, — at the time of the birth of the eldest son, or at the death of John J. Van Rensselaer, in 1828?

Taking that view of the case, the following points are presented for the appellant:—

First Point. John Van Rensselaer, the first-born son of John J. Van Rensselaer, was the first donee in tail, under the will of Colonel John Van Rensselaer, the devisor.

I. The devise to Morris and Douw, in trust to support the contingent remainders, &c., vested in the trustees a legal estate during the life of John J. Van Rensselaer, the grandson of the devisor. The said John J. Van Rensselaer took only an equitable estate for life, which could not unite with the legal remainder subsequently devised to his sons successively in tail male.

II. Even if the estate of John J. Van Rensselaer was executed by the statute of uses, as a legal estate in him, still it was an express estate for his own life only, and would not, under the rule in Shelley's case, unite with the remainders subsequently devised to his sons successively in tail male, and so create an estate tail in him. The sons thus designated take as purchasers, and not by descent. Lilly's Practical Conveyancer, 727; 2 Bl. Com., App. No. 2; Scarborough *v.* Saville, 3 Adolph. & Ell. 897; 24 Com. Law, 271; Hays on Estates Tail, p. 118; 2 Bl. Com. 171, notes; 9 Serg. & Rawle, 362; Willes, 336; Dickens, 183, 195; 35 Com. Law, 246; Butler's Notes to Co. Litt., No. 249, subd. 2, 3; Bacon's Works, 599; Touchst. 501; Lewin on Trusts, 2,356, 103, note l; Cornish on Uses, 15, 61; 1 Ves. & Beames, 485; 16 Ves. 296; 2 P. Wms. 680; 4 T. R. 247; 3 Bro. P. C. 464; 4 Kent's Com. 215, 221; Hays on Estates Tail, Proposition 4, pp. 4, 30, 31, 43; 4 Dane's Abr. 633; 3 Wend. 504; 2 Cruise's Dig. 39, tit. 16, ch. 7, § 26.

Second Point. John, the first-born son of John J. Van Rensselaer, took at his birth a vested remainder in fee tail; but as he died in the lifetime of his father (for whose life the trustees held), he never became "seized in fee tail of the lands, tenements, and hereditaments" devised, within the true intent and meaning of the statutes of 1782 and 1786, for the abolition of entails in New York. 1 Rev. Laws, 1813, p. 52.

I. The question arises upon well-known technical words; and they must be construed conformably to their established import. 6 Bac. Abr. 380, *Statute*, I. 2; 2 Cranch, 386; Ellmaker *v.* Ellmaker, 4 Watts, 89; Rutherforth's Institutes, book 2, ch. 7, § 4.

II. If upon the words the construction be doubtful, it will be proper to consider the preëxisting law, the evil to be remedied, the nature of the remedy designed, and the true reason of that remedy. 6 Bac. Abr. 383, *Statute*, I. 4.

III. The public history of the times in which the acts were passed may be resorted to. Aldridge *v.* Williams, 3 Howard, 24.

IV. Entails, as practised in England, and in this State prior to the acts in question, did not unduly suspend the power of alienation, but only embarrassed it by compelling a resort to the dilatory and expensive method of conveyance by fine and recovery. Spencer *v.* Lord Marlboro, 5 Bro. P. C. 592; 3 Tucker's Bl., p. 116, note 11, p. 363, note 7; Pigott on Rec. 20; Cruise on Fines and Rec., ch. 1, § 6; 2 Rev. Stat. 343, § 24; Str. 295; 1 Burr. 115; Willes, 453; 5 T. R. 108; 2 Bl. Com., App. No. 4, 5; 2 Bl. Com. 353, 355; 2 Wooddeson, 186, 187, 188, 198; 2 Chitty's Blackstone, p. 357, note 18; 24 Com. Law, 59; Parkhurst *v.* Dormer, Willes, 327; 13 East, 495; Taylor *v.* Horde, 1 Burr. 60; 30 Com. Law, 271; 8 Mass. 36; 2 Rawle, 175; 14 Geo. 2, ch. 20; 3 Bl. Com. 362; Wilson's Pigott on Rec. 27, 41; Cowp. 704; 2 Burr. 1067; 2 Wooddeson, 198; 4 Kent's Com. 18, 22, note b; 3 Call, 287; 14 Wend. 295, 334; 1 Jefferson's Misc. 34.

V. No evil, except the necessity of fines and common recoveries, was supposed to result from entails. Lord Mansfield, 1 Burr. 115; 3 London Law Mag. 371; Doctor and Student, ch. 32, 95; 2 Bl. Com. 361, A. D. 1765; 9 Serg. & Rawle, 339, 354; 4 Jefferson's Misc. 178.

1. In the sister States it was so considered, and their contemporaneous legislation conforms to this idea. See review of such legislation at end of points.

2. Fines and recoveries were at length dispensed with in England, 3 and 4 Wm. IV. ch. 74; 2 Chitty's Gen. Prac., Supplement, 79, 80.

3. The legislature of New York never attempted to curtail the power of suspending alienation until the Revised Statutes of 1830. It was not an object of the acts in question. Costar *v.* Lorrillard, 14 Wend. 294, 334.

4. Nor was the power then curtailed in a greater degree than it is curtailed by the plaintiff's construction of the acts in question.

VI. The terms of the acts, if construed literally and strictly, according to their fixed technical meaning, produce an effect precisely corresponding with the presumable intent of the legislature, as deducible from a review of the preëxisting law, the only acknowledged evil of entails, and the whole history of contemporaneous remedial legislation.

1. The remainder-man in fee tail never had at common law the absolute power of alienation, even by common recovery. He might bar his own issue by a fine, but he could not affect

the subsequent remainders. 2 Chitty's Blackstone, p. 357, note 18. He might unite with the tenant for life in suffering a common recovery, and thus bar the entail; but the assent of the freeholder was indispensable. See cases before cited. 2 Bl. Com. 362.

2. The acts in question accordingly require, at the moment when they convert the fee tail into a fee simple, a seizin in fee tail of the lands, tenements, or hereditaments. Meaning of word *Hereditament.* Symonds, 385; Thos. Coke, 197 to 242; Co. Litt. 6 a, 20, Hargrave's notes, 2 and 24; 2 Tomlyns, 86; 3 Tomlyns, 578; 1 Bouvier, 629; 2 Bouvier, 554; 2 Bl. Com. 17 to 48; 4 Dane's Abr. 500; 3 Kent's Com. 401; Cruise's Dig., book 1, tit. 1, § 1; 2 Chitty's Gen. Prac. 153; Flintoff, ch. 2, 3; Maugham, ch. 1; Roscoe on Real Actions, p. 16; Wood's Inst. ch. 1, 2, 3, 4, and p. 113; 1 Finch's Law, 111; Termes de la Ley, 254; Salk. 685, 239; 8 T. R. 503; 5 T. R. 558; 1 Bos. & Pul. 562; 2 Bos. & Pul. 247; Moseley, 240; 10 Wheat. 216; 9 Serg. & Rawle, 356; 6 Bac. Abr. 382, *Statute*, I. 4; Johnson's Dict.; Ainsworth's Dict., *Hæredium;* 2 Croker's Dict., *Hereditament;* 8 Enc. Brit. 473; 1 Rich. 3, ch. 7; 4 Hen. 7, ch. 14, 24; 11 Hen. 7, ch. 1, 20; 1 Hen. 8, ch. 8; 21 Hen. 8, ch. 4, 13, 15, 19; 32 Hen. 8, ch. 9, 32, 36; 34 & 35 Hen. 8, ch. 5, 40, 42; 11 & 12 W. & M., ch. 4; 3 and 4 Anne, ch. 6; 4 Stat. at Large, 110, 137, 217, 220, 420; 6 Ib. 64; Holt's Laws of N. Y., p. 85, § 1; Ibid., p. 258, § 4; 1 Rev. Stat. 507; 2 Rev. Stat. 317, § 1; 9 Cow. 564; 2 Cow. 497; 3 Paige, 245; 1 Rev. Laws of 1813, p. 363; 1 Rev. Laws, 747, §§ 23, 24, 25.

3. The word "*seized*" in these acts is not to be taken singly, but in conjunction with that of which the seizin is required, i. e. the lands, tenements, or hereditaments, i. e. the *res* or subject. Co. Litt. 14 b, 15 a, 17 a, 152 b; 3 Tomlyn's Dict. 446, *Seizin;* 2 Bouvier's Dict. 494, *Seizin;* 14 Johns. 407; 4 Dane's Abr. 664, § 5; Jackson *v.* Strang, 1 Hall, 32; Litt. §§ 541, 549, 235, 233; *Of a Rent*, Litt. 565; Co. Litt. 315 a; 5 Barn. & Cresw. 308; Bevil's case, 4 Coke, 9; *Form of Pleading*, Litt. 10; 2 Bl. 209.

4. The word "*seized*" is not here used in that secondary sense in which it serves to describe the condition of a remainderman or reversioner in respect to his estate, when such estate, not discontinued by any act or neglect of the freeholder having the precedent estate, is perfect and unharmed, and simply awaits the determination of the precedent estate to vest in possession. Even in that case it is never said that the remainderman or reversioner is seized of the lands, &c. But it is frequently said that he is seized of the remainder, or of his estate. Co. Litt. 347 b; 1 Burr. 107, 109; 4 T. R. 744; Litt. 451,

470, 673; 2 Bl. 357; Doe *v.* Cooper, 2 Barn. & Adolph. 283; Davis *v.* Gatacre, 5 Bingh. N. C. 609; 8 East, 566; Roscoe on Real Actions, 51 – 290; Stat. Champerty, 2 Rev. Stat. 691, § 6; Stat. Trespass, 1 Rev. Laws, 527, § 32; 1 Rev. Stat. 750, § 8.

5. It is an error to say "seizin of land" should not be pleaded. On the contrary, seizin of lands is always pleaded where it exists. In replevin, and many other cases, "in fee," or "in fee tail," or "for life," according to the fact, is added, because, in addition to seizin, the title is required to be pleaded. No instance can be found of an averment, that a party was "seized of land in remainder."

6. It is an error to suppose that seized "in fee," or "in his demesne as of fee," is used indifferently or confusedly in pleading the seizin of a remainder-man. 2 Denio, 23. The first form is proper when the remainder-man is not the freeholder (the prior estate being for life); the second form is proper when the remainder-man is the freeholder (the prior estate being for years only). And so are all the cases and precedents. Com. Dig. *Pleader*, c. 35; 6 Jacob's Dict. 41; Tomlyn's Dict. 41, *Seizin;* Greere *v.* Cole, 2 Saunders, 235; 7 N. Hamp. 59.

VII. The intent of the legislature was to seize upon the entail the instant there was in being an owner having a right by the will or settlement to acquire an absolute fee simple, and, dispensing with the formal and dilatory process of fine and recovery, to vest such fee simple at once by act and operation of law; thus, —

1. The only recognized evil of entails was remedied.

2. No violent or sudden change, overturning the lawful intent of the devisor or donor, was effected.

3. The consistency and harmony of the law was preserved.

VIII. Unless this is the construction, these statutes would be incongruous in their action, and would work injustice.

1. A seizin of the lands, &c., in fee simple absolute, would necessarily annihilate the precedent freehold. 2 Bl. Com. 104, 105.

2. There are commonly, in settlements in tail, ten or more successive limitations in tail. In each limitation the remainder is vested, and the remainder-man is seized of the remainder or estate the instant he comes into being. Fearne on Remainders, 217 to 221; Willes, 338. And consequently, if a seizin of the estate, i. e. the vested remainder, be sufficient, each of these remainders is, at the same instant, turned into a fee simple absolute, and made to destroy all the others.

3. This incongruity would not be advantageously obviated, if, by construction, a priority could be given to the first vested

remainder; because it often happens that the remainders, posterior in point of limitation, vest long before the prior remaindermen come into being. It was a common practice to settle to the use of an infant grandson for life, remainder in fee tail to his first and other sons successively, remainder in default, &c., to the use of settler's brother or uncle, remainder to the first and other sons of such brother or uncle, in tail. Here the last remainder is almost sure to vest before the former.

IX. The construction contended for by the plaintiff involves none of these incongruities, is according to the technical import of the words, the reason of the thing, and the construction in analogous cases.

1. A seizin of lands in fee tail entitled the wife to dower and the husband to courtesy; but seizin of a vested remainder in fee tail or in fee simple had no such effect. 1 Barbour's S. C. R. 506; Cornish on Remainders, 130; Watkins on Conveyancing, 44, 56; 2 Wooddeson's Lectures, 15, 17; Eldredge *v.* Forrestal, 7 Mass. 253; Acc. 23 Pick. 84; 22 Pick. 284; In re Cregier, 1 Barbour's Ch. R. 601; 4 Mason, 485; Dower Act, 1 Rev. Laws, 56, § 1; 4 Dane's Abr. 658, 663, § 22.

2. An heir, to whom a dry remainder expectant upon an estate for life descended, might, at common law, plead *riens per discent* to an action on his ancestor's bond debt. Fortrey *v.* Fortrey, 2 Raithby's Vernon, 134.

3. The words "where any lands, tenements, or hereditaments shall be held," in the statute of partitions, were held not to authorize a naked remainder-man or reversioner to be a plaintiff. 1 Rev. Laws, 507, § 1; Clapp *v.* Bromagham, 9 Cow. 564; 3 Paige, 245; 2 Cow. 497.

4. The statute of wills gave the power of devising to every person "having any estate in lands, tenements, or hereditaments." 1 Rev. Laws, 361.

5. The statute of executions subjects to levy and sale "all and singular the lands, tenements, and real estate" of the debtor. 1 Rev. Laws, 500, § 1.

6. See also the English statute subjecting the estates tail of bankrupts to their debts. 2 Bl. Com. 261 – 286.

7. The argument founded on a supposed unity of design in the first and third sections, in reference to the maxim *Seisina facit stipitem*, is unsound; for that maxim related only to descent in fee simple, and never had any application to estates tail. There the descent was *per formam doni*. 5 Bl. Com. 231, 232, 233; Chitty on Descents, 155; Co. Litt. 14 b, 15 b; Pigott on Recoveries, 108; 4 Com. Dig., *Estates*, B. 7, 8; 15 Maine, 412; Ratcliffe's case, 3 Coke, 41, 42.

8. The word "possessed" in the second section throws no

light upon the present question. It has no connection with the object of the first section. It is a statute of repose, like the statute of limitations; and it includes terms for years, where no seizin could exist. Such statutes are always made in favor of the actual possessor, and to cure defects of title, or a want of seizin. 1 Rev. Laws of N. Car. 258, § 1; 2 Haywood, 142; Best on Presumption, § 76; 2 Halstead, 177; Wood's Institute, book 2, ch. 1, p. 115; 2 Wooddeson's Lectures, 13, 178; 1 Hilliard's Abr., ch. 2, § 16, p. 24; Litt. 234; Co. Litt. 200 b, 17 a.

X. Contemporaneous legislation in the State of New York conforms to the construction contended for by the plaintiff.

1. The act of attainder (Holt's Laws of New York, p. 85, A. D. 1779) forfeits all the real estate of the delinquents.

2. Sect. 4 of the first act abolishing entails, not reënacted in 1786, (Holt's Laws of New York, p. 258,) shows that the legislature, in that act, attached a more extensive meaning to the words "real estate," than to "lands, tenements, and hereditaments." The distinction is also observed in section sixth of the act of 1786. 1 Rev. Laws, 53, § 6.

3. Fines and common recoveries were preserved, and regulated by statute (10th Sess., chap. 43), which shows that estates tail were not instantly and totally annihilated by the acts in question.

a. They were invented and used to bar entails, and scarcely ever, if at all, used for any other purpose. Pigott on Recoveries, 20; 3 Tucker's Blackstone, 116, note 11, p. 363, note 7.

b. When, in 1830, all estates tail, though not clothed with seizin, were either converted or extinguished, fines and recoveries were very properly abolished. 1 Rev. Stat. 728, §§ 3, 4; 2 Rev. Stat. 343, § 24.

Third Point. The plaintiff, upon the death of his elder brother without issue, in 1813, became the first remainder-man in fee tail. And on the death of his father, in 1828, he became seized in fee tail of the "lands, tenements, and hereditaments" devised; which seizin the statute of 1786 instantly converted into a fee simple absolute.

Supposing, however, the estate was converted into a fee on the birth of his eldest son, John J. Van Rensselaer would not take a fee until the death of that son, in 1813, when it would become his by descent.

The appellant contends that the reversion would, upon his death, in 1828, descend to his four children, the appellant and his brothers and sister.

Fourth Point. The deed from John J. Van Rensselaer to Daniel Penfield contained no warranty, nor any covenant, ex-

cept one against encumbrances. A title subsequently acquired by grantor does not enure to the benefit of grantee. Jackson v. Winslow, 13 Cowen, 18; Pelletreau v. Jackson, 11 Wend. 116 (opinion to this precise effect delivered by Judge Nelson, subsequently affirmed); Jackson v. Waldron, 13 Wend. 212; Jackson v. Hubbell, 1 Cowen, 616; McCrackin v. Wright, 14 Johns. 194; Jackson v. Bradford, 4 Wend. 622; Jackson v. Peck, 4 Wend. 305; Dart v. Dart, 7 Cowen, 256; Jackson v. Natsdorf, 11 Johns. 97, per Thompson, J.; Trull v. Eastman, 3 Metcalf, 124.

The deed to Daniel Penfield was executed in pursuance of an agreement between the parties. In construing them, both instruments are to be taken together to arrive at the meaning of the parties. Beaumont v. Bramley, 1 Turn. & Russ. 52; Proctor v. Pool, 4 Dev. 373; Crone v. Odell, 1 Ball & Beat. 489; Moore v. Jackson, 4 Wend. 67; Atkinson v. Pillsworth, 1 Ridg. P. C. 461; Lansdown v. Lansdown, 2 Bligh, P. C. 60; Strong v. Benedict, 5 Cowen, 210; Collins v. Masters, 2 Bailey, S. C. Law R. 145; Sumner v. Williams, 8 Mass. 214; Miller v. Heller, 7 Serg. & Rawle, 40; Foord v. Wilson, 8 Taunton, 543; Nivd. v. Marshall, 1 Brod. & Bingh. 319; Miller v. Horton, 1 McClelland, 647; Johnson v. Hoffman, 9 Law, 273; Hesse v. Albert, 3 Mann. & Ryl. 406; Davis v. Lyman, 6 Conn. 253; Allen v. Barish, 3 Hammond, 134; Hurd v. Cushing, 7 Pick. 171; Adams v. Cuddy, 13 Pick. 463; Ibid. 119; Knickerbocker v. Kilman, 9 Johns. 107.

Fifth Point. Taken together, the intent of the parties was clearly to purchase and convey the title of John J. Van Rensselaer, and nothing more, to Daniel Penfield, and only to covenant against all encumbrances except the leases and one mortgage, particularly mentioned in both instruments.

The points made by the counsel for the appellees were the following.

I. Under the will and codicil of John Van Rensselaer, there was an estate tail male in remainder in the premises in question, (viz. in the rents reserved in fee on the sale of the Claverack lands, and in the lands unsold,) in John Van Rensselaer, son of John J. Van Rensselaer, grandson of the testator, expectant upon the death of the said John J. Van Rensselaer, which vested when he, the said John Van Rensselaer, was born. 1 Inst. 19, 20; Doe v. Perryn, 3 T. R. 484; 2 Hill. Abr. 403; Carver v. Jackson, 4 Peters, 89, 90; Doe d. Barnes v. Provoost, 4 Johns. 61.

II. The estate tail, so vested in remainder in the said first-born son, was abolished by the statute of 1786, and turned into

a fee simple, which thereby destroyed all the ulterior remainders; because,—

1st. The object of the act was to abolish entails altogether, and thereby to abolish primogeniture, which was peculiarly protected by the statute *de donis.*

2d. If the abolition of entailments under said act should be confined to cases of actual corporeal possession of the estate tail in freehold, a large class of estates, rights, and interests would not be freed under it, but would be still subject to entailments, and to the law of primogeniture in its most rigid form; viz. all expectancies and incorporeal hereditaments.

3d. The abolition of entailments might be followed either with the return of the estate to the old qualified fee on which the estate tail was engrafted, or with the conversion of the estate into a fee simple. And the design of the act in stating that the party seized of the entail should become seized of the fee, was to explain the character of the abolition, viz. its conversion into a fee, and not to limit it so as to exclude expectancies and incorporeal hereditaments.

4th. The seizin designed in that clause of the act was such as is sufficient to cast the descent in the particular case.

5th. A vested remainder in tail, acquired by devise (which is a purchase), is descendible; the owner thereof having such a seizin as will make him the *stirps* or stock of descent. Ld. Raym. 728; Jacob, tit. *Purchase;* Cro. Eliz. 431; 1 T. R. 404, 634; 2 Bl. Com. 241; Ratcliffe's case, 3 Rep. 42.

6th. The seizin, to cast the descent even of a fee, need not be an actual corporeal possession of the freehold; and to cast a descent of an estate tail acquired by devise from the tenant as the stock of descent, it is sufficient that such tenant is *in esse* and the estate vested in him, even if it be an expectancy or an incorporeal hereditament. Doe *v.* Hutton, 3 Bos. & Pull. 648; Cruise, tit. 29, ch. 4, §§ 15, 16, 17; Co. Litt. 52 b; 3 Jac. Law. Dict. 92; Dyer, 141; 1 Rev. Statutes, 751, § 5; 1 Rev. Laws, 527, § 33; 2 Chit. Pl. 568, Springfield ed. 1833; 3 Chit. Pl. 1331; Com. Dig., *Pleader*, c. 35, 6; Jac. Law Dict., tit. *Seizin;* also tit. *Remainder and Reversion;* Throtsby *v.* Adams, Plowd. 191, 921; Wade *v.* Bache, 1 Saund. 149; Alton Wood's case, 1 Rep. 27 b; Theobald *v.* Tindal, 3 Went. Pl. 502, 503; Clare *v.* Brooke, 2 Plow. 443; Hearne's Pleader, 837; Modern Entries, 201; Leyman *v.* Abeel, 16 Johns. 31; Jackson *v.* Hendricks, 3 Johns. Cas. 214; Bates *v.* Schroeder, 13 Johns. 260; Jackson *v.* Hilton, 16 Johns. 96; Doe *v.* Provost, 4 Johns. 61; Burnet *v.* Denniston, 5 Johns. Ch. 35; 2 Johns. 288; Vanderheyden *v.* Crandall, 2 Denio, 9; Van Rensselaer *v.* Poucher, 5 Denio, 35, affirmed by the Court of Appeals, New York, MSS.

7th. A remainder in tail, which may be inherited or holden, is a tenement or hereditament, and is embraced within the language of the first section of the act of 1786. Cruise, tit. 2, ch. 1, § 8.

III. John J. Van Rensselaer, upon the death of the testator, became seized of a freehold estate for life in the premises in question, as well in the rents as in the lands not demised; and, upon the birth of his first-born son, had an expectancy in fee, as presumptive heir of his said first-born son.

IV. John J. Van Rensselaer, being seized of and entitled to the said premises, did on the 4th of March, 1794, in and by articles of agreement, for a full pecuniary consideration, covenant with Daniel Penfield to convey to him the said premises in fee simple, with the full and absolute enjoyment thereof, free from all encumbrances and charges, other than leases of himself and ancestors.

V. John J. Van Rensselaer, being so seized, did on the 31st of December, 1794, and the 1st of January, 1795, by lease and release, for a full pecuniary consideration, sell and convey the said lands to the said Daniel Penfield in fee simple, *habendum* to the said Daniel Penfield, his heirs and assigns for ever, as fully as he, the said John J. Van Rensselaer, then enjoyed, or theretofore had enjoyed the same; that is to say, whether the ownership embraced the land itself in possession or reversion, or an incorporeal right in the land, such as rent reserved.

VI. The first-born son of John J. Van Rensselaer having been at his birth vested with an estate in fee simple in expectancy in said rents and lands not leased in virtue of the devise and the act of 1786, upon his death without issue, said rents and lands descended from him in fee to his father. N. Y. Stat.

VII. John Watts, as the grantee of Daniel Penfield, with covenants for the title in fee, being at the time of the death of the first-born son seized in his demesne of a freehold life estate, under and by virtue of the aforesaid conveyance by lease and release from John J. Van Rensselaer, the estate in fee simple in the premises so descended to the said John J. Van Rensselaer enured to the benefit of the said John Watts, and by his will subsequently vested in his devisees. 2 Hill. Abr. 401; Sweet *v.* Green, 1 Paige, 473, 476: Stow *v* Wise, 7 Cow. 214; Astor's case, 4 Peters, 85.

VIII. John J. Van Rensselaer and his heirs at law, of whom the plaintiff is one, by his aforesaid conveyance to Daniel Penfield were and are estopped in law from claiming any right and interest in the premises.

1. The covenant in the deed of 1795 amounts to a stipulation and guaranty, that the grantee should quietly enjoy the

entire fee in the property conveyed, viz. in the land, where he owned the land itself, and in the incorporeal hereditaments, viz. the rents and reversions, where the lands had been leased.

2. The description in the *habendum* clause of said lease was not intended to qualify or affect the quantity of estate, but the subject-matter, and to confine and apply it as well to rents and reversionary interests, where there had been leases, as to lands not having been leased. 2 Hill. Abr. 350, and references.

3. The articles of agreement show a fee was intended, and not such an interest as he might chance to have. 2 Hill. Abr. 341; 2 Atk. 545; 6 Har. & Johns. 460; Jones *v.* Gardner, 10 Johns. 266.

4. The covenants in said deed, so construed, not only harmonize with the said description in the *habendum* clause, as above explained, but also with the intent manifested in the said articles of agreement, and are thus rendered operative. 2 Bl. 107, 108; Jones *v.* Gardner, 10 Johns. 266.

5. The covenant in the deed, being in fee between the parties and their heirs, that the land is free from encumbrances, except leases, &c., specified, is broken, if there be any other outstanding encumbrances; and an estate in expectancy oustanding is an encumbrance upon the land and the seizin thereof. Prescot *v.* Freeman, 4 Mass. 627; 14 Viner's Abr. 352, tit. *Encumbrance*, A.; Sugden, 527, § 9, II.; Jackson *v.* Parker, 9 Cow. 86; Lovell *v.* Luttrel, Savile, 74.

6. The said John J. Van Rensselaer, by the whole context of the said deed and the said articles of agreement taken *in pari materia*, held himself out to the purchaser as a fee simple owner, and having at the time an expectancy in fee as presumptive heir, is estopped from claiming the title which afterwards descends upon him as such heir. Mason *v.* Muncaster, 9 Wheat. 445; Jackson *v.* Bull, 1 Johns. Cas. 81; Jackson *v.* Murray, 12 Johns. 201; Fisher *v.* Newland, 21 Wend. 94; Jackson *v.* Stevens, 13 Johns. 319; Noel *v.* Barclay, 3 Simons; Fairbanks *v.* Williamson, 7 Greenleaf, 97; Helps *v.* Hereford, 2 Barn. & Ald. 242; Rees *v.* Lloyd, Wightw. 123; McWilliams *v.* Nasby, 2 Serg. & Rawle, 512; Goodtitle *v.* Morse, 3 T. R. 365; Carver *v.* Jackson, 4 Pet. 89, 90; Bensly *v.* Burdon, 2 Sim. & Stu. 519; 1 Rev. Laws N. Y., p. 74, § 5; 1 Greenleaf's Ev. §§ 22, 24, 207, 210; 8 Wend. 483; 4 Wend. 619; 1 Rev. Stat. N. Y. p. 739, §§ 143, 145.

IX. Assuming that John J. Van Rensselaer, the grandson, took an estate tail under the will, the same was, by the rule in Shelly's case, at once, upon the death of the testator, turned into a fee by the act of 1786, and the fee passed directly by his deed to Penfield.

X. Where there is any doubt or difficulty, the construction

should be favorable to the grantee. Jackson *v.* Gardner, 8 Johns. 391.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the Southern District of New York.

John Van Rensselaer, being seized in fee of a large tract of land in the county of Columbia, State of New York, made and published his last will and testament on the 25th of May, 1782, by which he devised the same to John J. Van Rensselaer, his grandson, for and during his natural life; and from and after his decease, to the first son of the body of the said John J. lawfully begotten, and to the heirs male of his body; and, in default of such issue, then to the second, third, and every other son of the said John J., successively, and, in remainder, the one after the other, as they shall be in seniority of birth, and the several and respective heirs male of the first, second, third, and other son or sons; the eldest of such sons, and the heirs male of his body, being always preferred.

The testator died in 1783, leaving John J., the grandson, surviving, who entered into the possession and enjoyment of the estate. John J. had five children, John, the first-born, whose birth was in 1791, Jeremiah, the present complainant, Cornelius, and Glen, and a daughter, Catherine G.

By an act of the legislature of the State of New York, passed 23d February, 1786, it was enacted as follows: "That all estates tail shall be, and hereby are, abolished; and that, in all cases where any person or persons now is, or, if the act hereinafter mentioned and repealed [referring to an act passed 12th July, 1782] had not been passed, would now be, seized in fee tail of any lands, tenements, or hereditaments, such person and persons shall be deemed to be seized of the same in fee simple absolute; and further, that, in all cases where any person or persons would, if the said act and this present act had not been passed, at any time hereafter become seized in fee tail of any lands, tenements, or hereditaments, by virtue of any devise, gift, grant, or other conveyance heretofore made, or hereafter to be made, or by any other means whatsoever, such person or persons, instead of becoming seized thereof in fee tail, shall be deemed and adjudged to become seized thereof in fee simple absolute." 3 Rev. Stat. N. Y., 1st ed., App. 48; 1 Rev. Laws, 1813, p. 52.

As we have already stated, John, the first-born son of John J., the grandson, was born in 1791, and he died without issue in 1813, while the life estate was running, his father having survived until 1828.

On the birth of John, the first-born, his remainder as the first tenant in fee tail, which was before contingent, became vested in interest, and he was thereafter seized of an estate tail in remainder, the vesting in possession being dependent upon the termination of the life estate.

The interest in the estate in remainder in which they vested immediately on his birth carried with it a fixed right of future enjoyment in possession, the instant the life estate terminated.

The question upon this branch of the case is, whether or not the estate in fee tail in remainder thus acquired under the will of John Van Rensselaer was converted into a fee simple absolute in John, the first-born son of John J., by the operation of the act of 1786, abolishing entails.

The act provides, that if any person shall thereafter "become seized in fee tail of any lands, tenements, or hereditaments, by virtue of any devise," &c., he shall be deemed to have become seized in fee simple absolute.

It is admitted that John, the first-born, took a vested remainder in fee tail under the will, the instant he came into being, and that he was seized of an estate in remainder in the premises in question; but it is insisted that this is not the character of the estate described in the statute, and which is there turned into a fee simple; that, in order to bring the case within it, the tenant in tail in remainder must be vested in possession, as well as in interest, and without which he cannot be said to be seized of the lands, tenements, or hereditaments; and, as John died during the running of the life estate, and therefore was never seized in possession, the fee simple did not vest in him under the statute; but was postponed to the next tenant in tail, the second son, Jeremiah, who is the complainant in the suit.

We do not propose to enter into an examination of this question, and which involves the true construction of the act of 1786; as that act has been several times before the courts of New York, and its construction settled by the highest authority in that State. (Vanderheyden *v.* Crandall, 2 Denio, 9; S. C. on appeal, 1 Comstock, 491; Van Rensselaer *v.* Poucher, 5 Denio, 35.)

One of the cases arose under the will before us, and involved the question as to the effect of the act upon the estate of John, the first-born tenant in tail, the same as here.

The construction of the act as given in these cases must form the rule of decision upon the question, according to the established course of proceeding in this court. (12 Wheat. 167, 168; 6 Peters, 291; 7 How. 818; 8 How. 558, 559.)

In the case in the Court of Appeals in New York, Mr. Justice Bronson, who delivered the judgment of the court, observed

that "it is true the statute speaks of a person seized of lands, tenements, or hereditaments; and, in general, seizure of lands, means actual possession of them. But, taken in their connection, the words evidently mean seizin of an estate in lands. The legislature began by speaking of estates tail; that was the subject in hand; those estates were to be turned into estates of a different tenure or quality; and the law-makers must be understood as speaking of the same thing in the latter part of the clause which they had mentioned in the first."

He observes, "As I read the statute, the provision is, that all estates tail shall be abolished; and where any person now is seized of an estate in fee tail on any lands, &c., such person shall be deemed to be seized of the same (to wit, an estate in the lands) in fee simple."

He further remarks, "The third section, which regulates descents, like the first, which abolishes entails, speaks of a person seized of lands, tenements, or hereditaments; and I think the word 'seizin' was used in the same sense in both sections. One who has a vested remainder in fee simple expectant on the determination of a present freehold estate has such a seizin in law, when the estate was acquired by purchase, as will constitute him a *stirps* or stock of descent under the third section. And the person who has a vested remainder in fee tail, acquired in the same way, has such a seizin in law as brings his case within the operation of the first section. His remainder in fee tail is turned into a remainder in fee simple. The first section brings the case under the influence of the third. And the estate no longer follows the will of the donor, but is governed by the general law of descents."

This being regarded as the true construction of the act of 1786, it follows that John, the first-born son of John J., took an estate in fee simple absolute in remainder in the premises; and that on his death, in 1813, it descended, according to the law of New York, to his father, the life tenant; and the two estates being thus united in him, he became vested with the whole estate in fee simple absolute.

The complainant, therefore, has failed to make out any estate in the premises under the will of John Van Rensselaer. And can claim title only through his father, John J., as one of the heirs of his estate.

The tract of land in question embraces between thirty-three and thirty-four thousand acres, and on the 1st of January, 1795, John J., the life tenant, sold and conveyed the same in fee to Daniel Penfield, for the consideration of $44,550.

It is more than probable it was the opinion of the profession in New York, at the date of this conveyance, that John J., the

grandson, took an estate in fee tail under the will of his grandfather, within the rule in Shelley's case, which the act of 1786 had turned into a fee simple absolute; and that the purchase was made under the belief that he was competent to convey the fee.

It is admitted, however, that this construction, which may have been given at the time, was a mistaken one; and that he took only an estate for life, which terminated on his death, the 26th of September, 1828. At that time, we have seen, he was seized of the whole estate in fee in consequence of the death of his eldest son, the first-born tenant in fee tail in 1813, and which descended to his four children, three sons and a daughter, as tenants in common, of whom the complainant is one, unless they are estopped from setting up the title by the deed of the 1st of January, 1795, to Penfield, under whom the defendants hold.

On the part of the complainant, it is insisted that the conveyance is a deed of bargain and sale, and quitclaim, without any covenants of title or warranty, and therefore could operate to pass only the estate for life of which the grantor was then seized; that it contains no appropriate words, when taken together, by force of which the subsequently acquired title enured to the benefit of the grantee, or those claiming under him, or that can estop the heirs from denying that he had any greater estate than the tenancy for life; and that the deed purports on its face to grant and convey simply the right, title, and interest which the grantor possessed in the premises at the time, and nothing more; that the only covenant is a covenant against encumbrances, which affords indemnity against any liens or charges upon the estate conveyed, but which cannot be regarded as warranting the title; and that this express covenant takes away all implied ones.

This is the substance of the argument on the part of the appellant.

By the covenant against encumbrances, the grantor, for himself and his heirs, covenants and agrees to and with the grantee and his heirs and assignees, that the tract of land conveyed, excepting parts previously sold in fee by his ancestor, John Van Rensselaer, and by himself; also, lands leased to Robert Van Rensselaer, a lot of woodland to be conveyed by the grantee to H. J. Van Rensselaer, a tract lying in the city of Hudson, and a farm in the possession of Mrs. Moore,—with the exception of these several parcels, the grantor covenants that the tract conveyed is free and clear, and shall be held and enjoyed by the grantee, his heirs and assigns, according to the true intent and meaning of these presents, freely and clearly

acquitted and discharged of and from all encumbrances and charges other than leases heretofore given by the said grantor and his ancestors.

This covenant, it will be seen, excepts out of the indemnity, in express terms, parcels of land previously granted out of the tract, in fee simple, and the title to which was outstanding in third persons; and also the leases which had been given in fee, or for the lives of the lessees, on which rents had been reserved, and which leases were to be transferred to the grantee as rents and profits belonging to the estate, and which he was to enjoy.

The draughtsman seems to have supposed that the outstanding titles in fee in these several tracts, and also the leases in fee and for lives previously granted, and above referred to, would have been embraced within the covenant, unless expressly excepted out of it, and that they might be regarded as an encumbrance upon the estate which the deed purported to convey, and consequently a breach of this covenant against encumbrances. This is the natural, if not the necessary, implication from the structure of the covenant; for, otherwise, the exceptions are without meaning.

And, by parity of reasoning, the implication is equally strong, that the covenant embraced, and was intended to embrace, and secure to the grantee and his heirs, the whole of the interest and estate in the tract which the deed purports to convey, saving and excepting only the parcels and portions of the title thus enumerated and taken out of it; and hence, if any outstanding title existed not enumerated and excepted, there would be grounds for alleging a breach of the covenant, and for claiming that the grantee, his heirs or assigns, were entitled to an action to recover indemnity for such diminution of the estate.

This result would seem almost necessarily to follow from the nature and structure of the covenant, unless we regard it as inserted mainly for the benefit of the grantor, to enable him to make the exceptions. For it is but reasonable to presume that the draughtsman, in making the exceptions, did not stop short in the enumeration of the parts and portions of the estate and title intended to be saved from its operation; or that he omitted any right or interest not intended to pass by the conveyance. And hence the reasonableness of the implication, that every part of the estate and interest in the same that the deed purported to convey was intended to be embraced within the covenant not included within the exception.

These several rights and interests had already been excepted out of the granting clause in the deed, and hence the excep-

tion in this part of the instrument was not necessary for this purpose. The exception here related exclusively to the covenant of enjoyment of the premises free from all encumbrances; and was intended as a saving from its scope and obligation.

There is much force, therefore, in the argument, that this covenant, from its peculiar phraseology and structure, was intended as something more than a simple covenant against encumbrances and charges upon the estate; and that it was intended by the parties as a covenant of the title which the deed purported to convey, and if so, this of itself would operate upon the estate subsequently acquired by the grantor, so that it would, as against him and all persons claiming under him, enure to the benefit of the grantee, his heirs and assigns.

But independently of this view, and of any covenants of title, in the technical sense of the term, in the deed of 1st January, 1795, we are of opinion that the complainant is estopped from denying that John J. Van Rensselaer, the grantor, was seized of an estate in fee simple at the date of that deed, the grounds of which opinion we will now proceed to state.

The general principle is admitted, that a grantor, conveying by deed of bargain and sale, by way of release or quitclaim of all his right and title to a tract of land, if made in good faith, and without any fraudulent representations, is not responsible for the goodness of the title beyond the covenants in his deed. (7 How. 159; 2 Sugden on Vendors, ch. 12, § 2, p. 421; 2 Kent's Comm. 473; 4 Ib. 471, note; 1 Cow. 616; 9 Cow. 1; 4 Wend. 622; 7 Conn. 256; 11 Wend. 110; S. C. 13 Wend. 78; 12 Pick. 78; 1 Rev. Stat. N. Y. 739, §§ 143, 145; 15 Pick. 23; 14 Johns. 193.)

A deed of this character purports to convey, and is understood to convey, nothing more than the interest or estate of which the grantor is seized or possessed at the time; and does not operate to pass or bind an interest not then in existence. The bargain between the parties proceeds upon this view; and the consideration is regulated in conformity with it. If otherwise, and the vendee has contracted for a particular estate, or for an estate in fee, he must take the precaution to secure himself by the proper covenants of title.

But this principle is applicable to a deed of bargain and sale by release or quitclaim, in the strict and proper sense of that species of conveyance. And therefore, if the deed bears on its face evidence that the grantors intended to convey, and the grantee expected to become invested with, an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then, although it may not contain any covenants of title in the technical sense of the

term, still the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted; at least, so far as to estop them from ever afterwards denying that he was seized of the particular estate at the time of the conveyance.

The authorities are very full on this subject. Goodtitle *v.* Bailey, Cowp. 601; Bensley *v.* Burdon, 2 Sim. & Stu. 524; S. C., 5 Russell, 330; 2 Barn. & Ad. 278, where this case is referred to; Doe ex dem. Marchant *v.* Ewington, 8 Scott, 210; Rees *v.* Lloyd, Wightwick, 129; Bowman *v.* Taylor, 2 Ad. & Ellis, 278; Lainson *v.* Tremere, 1 Ib. 792; Stone *v.* Wise, 7 Conn. 214; Penrose *v.* Griffith, 5 Binney, 231; Denn *v.* Cornell, 3 Johns. Cas. 174; 8 Cow. 586; Carver *v.* Jackson ex dem. Astor, 4 Peters, 1; 7 Greenl. 96; 4 Kent's Com. 271, note; 1 Smith's Leading Cases, p. 450, note to the Duchess of Kingston's case.

In the case of Bensley *v.* Burdon, the party granting the estate recited that he was entitled to a remainder in fee, expectant upon the determination of the life estate of his father, in certain premises therein described. In point of fact, he had no interest in the premises at the time; but became vested with an estate for life in a part of them some two years afterwards, under the will of his father, and soon after conveyed this interest to the defendant.

The Vice-Chancellor held, that the grantor having averred in the deed that he was seized of a remainder in fee, expectant on the death of his father, he was estopped from setting up, that, at the time of the grant, he was not duly seized of the estate according to the averment; that the estoppel run with the land, and bound not only the grantor, but all claiming under him; and that the defendant was, therefore, equally estopped from denying the title.

There was an appeal in this case to the Lord Chancellor, and his decision is referred to as reported in 5 Russell, 330; but there is an error in the reference, and I have not been able to find it.

But in Right ex dem. Jefferys *v.* Bucknell (2 Barn. & Ad. 281), Lord Tenterden refers to the case, and says that the judgment of the Vice-Chancellor was affirmed, and that the Chancellor put his decision on the ground, that the recital of the interest of the grantor in the premises was an averment of a particular fact, by which the defendant was concluded.

And in the case of Doe ex dem. Marchant *v.* Ewington, which was an action of ejectment to recover possession of a set of chambers in Lincoln's Inn, it appeared that one Boileau, having been admitted by the Benchers of the society, the owners

of the fee, to the chambers for life, had granted the same to the lessor of the plaintiff in trust to secure an annuity, reciting in the deed that he was well entitled to an estate for life in the chambers.

Afterwards Boileau, by an arrangement with the defendant, surrendered to him the possession of the chambers, who continued to occupy them at the time of the commencement of the suit, which was brought in consequence of the annuity being in arrear.

By the regulations of the society, it appeared that, in order to surrender possession, the person last admitted must present a petition to the Masters of the Bench for permission to surrender, first paying all his arrear of dues; and the person who is to succeed must also present a petition to be admitted; and thereupon, if consent be given, then an order is entered that the person admitted may have leave to surrender, and the person who is to succeed may be admitted on paying the fine and fees. And that it is in the discretion of the masters, for the time being, to make such orders for the admission to or exclusion from chambers in the Inn as they may think fit.

The lessor of the plaintiff sought to recover on the ground that Boileau was estopped from denying that he was seized of an estate for life in the chambers by the recital in his conveyance; and that the defendant coming in under him was equally estopped.

Tindall, C. J., in giving judgment, observed, that the case had very properly been argued on the ground of estoppel; for if it were a question of title, the lessor of the plaintiff would clearly be out of court. That he must claim under the estoppel created by the recital in the deed of conveyance. He admitted that Boileau was bound by the recital; and the defendant also, if in privity of estate; that, according to the old authorities, he must either come in the per or the post, that is, he must claim from, through, or under the party. That the defendant did not claim under Boileau, but under the trustees of the society of Lincoln's Inn, and therefore was not estopped from denying the title.

Coltman, J. observed, that, as between Boileau and the lessor of the plaintiff, the former might be estopped from denying that he had the estate he represented by his deed; but that, to enable the plaintiff to succeed, it was necessary for him to show that the defendant claimed through or under Boileau, so that the estoppel should affect him.

In the case of Bowman *v.* Taylor, Lord Denman, C. J. observed, that, "as to the doctrine laid down in Co. Litt. 352 b, that a recital doth not conclude, because it is no direct affirma-

tion, the authority of Lord Coke is a very great one; but still, if a party has by his deed recited a specific fact, though introduced by a 'whereas,' it seems to me impossible to say that he shall not be bound by his own assertion so made under seal."

And Taunton, J. remarked, in the same case, that the law of estoppel is not so unjust or absurd as it has been too much the custom to represent. The principle is, that, where a man has entered into a solemn engagement by deed under his hand and seal as to certain facts, he shall not be permitted to deny any matter which he has so asserted.

In the case of Fairbanks *v.* Williamson, there was no covenant of title in the deed, which was in fee; but the grantor covenanted that neither himself, his heirs, or assigns would ever make any claim to the premises. The court held that this operated as an estoppel, not only upon him, but upon all claiming under him, from setting up an after-acquired title to the land against the grantee or those in privity with him.

In Jackson ex dem. Munroe *v.* Parkhurst et al. (9 Wend. 209), the recovery was placed altogether on the ground of estoppel, the defendant holding under the grantor of the deed in which the title was recited. And in Right ex dem. Jefferys *v.* Bucknell, where the recital in the deed was, that the grantor was *legally* or *equitably* entitled to an estate in fee in the premises, the court refused to bind the party coming in under him as a purchaser for a valuable consideration of the after-acquired title, solely on the ground that there was no certain and precise estate set forth in the recital.

The principle deducible from these authorities seems to be, that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seized or possessed of a particular estate in the premises, and which estate the deed purports to convey; or, what is the same thing, if the seizin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title as between parties and privies.

The reason is, that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase, and hence the grantor and those in privity with him, in good faith and fair

dealing, should be for ever thereafter precluded from gainsaying it.

The doctrine is founded, when properly applied, upon the highest principles of morality, and recommends itself to the common sense and justice of every one. And although it debars the truth in the particular case, and therefore is not unfrequently characterized as odious, and not to be favored, still it should be remembered that it debars it only in the case where its utterance would convict the party of a previous falsehood; would be the denial of a previous affirmation upon the faith of which persons had dealt, and pledged their credit or expended their money.

It is a doctrine, therefore, when properly understood and applied, that concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only when in conscience and honesty he should not be allowed to speak.

Now, applying this doctrine to the case in hand, our next inquiry will be, whether or not John J. Van Rensselaer affirmed, in his deed of January 1, 1795, to Penfield, that he was seized of an estate in fee in the premises, and whether the deed purports on its face to convey an estate of that description.

As to the question involved in the latter branch of the inquiry, we need only refer to the words of the grant to determine it. The deed is of all the right, title, and interest of the grantor in the tract of land to Penfield, his heirs and assigns for ever, terms that would have passed an estate in fee, if John J. had been seized of it at the time of the conveyance.

The most important question arises upon the other branch of the inquiry. Has the grantor affirmed on the face of the deed that he was seized of this particular estate in the premises at the time he made the grant?

The argument on the part of the complainant is, that, although the granting words of the deed are broad and comprehensive, — such as, "have granted, bargained, sold, aliened, enfeoffed, assured, released, and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, assure, release, and confirm unto the said Daniel Penfield," "and to his heirs and assigns for ever, all and singular the aforesaid tract of land," &c., "and also all leases of and concerning any part or parts of the said granted premises; and also all the estate, right, title, interest, property, possession, claim, and demand of them, the said John J. Van Rensselaer and Catherine, his wife, in the same," — yet the grant is qualified by the *habendum* clause, — "to have and to hold the said tract of land so described, and so butted and bounded as above recited, &c., unto the said Daniel Penfield, his heirs and assigns, to the only proper

use and behoof of the said Daniel Penfield, his heirs and assigns for ever, in as full and ample a manner as the said John J. Van Rensselaer now hath and enjoyeth the same, and in as full and ample a manner as the same hath heretofore been had and enjoyed by the said John J. Van Rensselaer, or lawfully might, if these presents were not made, be had, used, occupied, or enjoyed by him, his heirs or assigns."

This latter clause, it is supposed, restricts and qualifies the general words in the grant, and confines the effect and operation of the deed to the conveyance of such an estate as the grantor was seized and possessed of at the time; and, as this was an estate for life with remainder over, it operated, and was intended to operate, to convey only this estate.

Were there nothing else in the case, there might be much difficulty in furnishing a satisfactory answer to this view, although no one, we think, can read the deed without being strongly impressed with the conviction, that both parties supposed they were dealing with the fee, and that the bargain was made upon that understanding.

But, in order fully to comprehend and interpret this qualifying clause in the *habendum*, it is material to look into the nature and condition of the title at the time, and the mode of enjoying the estate, and also into the evidences of the title which were turned over to the purchaser at the execution of the contract, all of which appear in the deed and articles of agreement therein recited and referred to.

As we have already said, in another branch of the case, a part of the tract had been previously conveyed in fee, and amongst others by the grantor himself, and which is excepted from the grant. Much the larger part was at the time in the occupation of tenants under leases in fee, or for the lives of the lessees, with rents reserved, made, amongst others, also by John J., which leases were transferred to Penfield as muniments of the title. The articles of agreement provided for the transfer of these leases, and the deed itself in terms embraces them in the granting clause.

In the articles of agreement, also, Penfield is required to covenant that he will execute leases, according to the terms and conditions upon which they had been usually granted, of certain portions of the tract to several persons therein named; and which leases, as we have seen, according to the custom of granting, were to be made in fee, or for the lives of the lessees. The deed also contains the recital of a mortgage in fee upon the estate, given by John J., the 11th August, 1791, to Schuyler, for securing the payment of $ 7,750, which Penfield was to discharge out of the purchase-money.

Now all these instruments affecting the title, and showing the tenure and conditions by and under which the estate was held and enjoyed, are particularly referred to in the articles, and in the deed of conveyance, and are thus virtually incorporated into the same; and were so for the purpose of describing with greater precision the nature and condition of the title, and of the rights and interests of the grantor in the tract conveyed. And looking at them, and at the right and title therein asserted and affirmed, and upon the faith of which the purchase was made and the deed taken, we shall be enabled to comprehend and give proper application to the words in the *habendum*; namely, that the grantee, his heirs and assigns, shall hold in as full and ample a manner as the same is possessed, occupied, and enjoyed by the grantor, or as might be possessed and enjoyed by him, his heirs and assigns, if these presents had not been made.

Admit that the clause refers to the title and estate possessed by the grantor, as well as to the premises described, what title and estate? Manifestly that which is evidenced by the muniments of title before referred to, and particularly identified and described in the granting clause of the deed, a title evidenced by leases in fee with rent reserved, made by John J. and his ancestors, and which passed to the grantee as securing the rents and profits issuing out of and belonging to the estate conveyed.

These leases characterize the title to the tract sold, and afford evidence that cannot be mistaken of the estate intended to be conveyed, and it was the enjoyment of this estate and interest in the premises, in the manner and way in which the grantor had used, occupied, and enjoyed the same, to which the *habendum* clause refers. This affords a full explanation of its object and meaning.

The reference to these leases, and virtual incorporation of them into the deed, and transfer as muniments of the title, especially those made by John J. himself, together with the mortgage in fee to Schuyler which was to be raised out of the purchase-money, and the covenants required of Penfield to grant similar leases to certain persons named, all clearly import, on the face of the instrument, an assertion, or affirmation on the part of the grantor, that he was seized of a title that enabled him to make the leases and mortgage, and that would also enable Penfield to grant similar leases, namely, leases in fee; and which brings the case directly within the principle of law already stated, that estops him, and those coming in under him, from denying that he was so seized.

The estoppel works upon the estate, and passes with it, and

binds the title subsequently acquired by the death of his eldest son, the first-born tenant in tail.

We are satisfied, therefore, after the fullest consideration of the case, that the decree of the court below is right, and should be affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New-York, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

JOHN DEN, LESSEE OF POLLY WEATHERHEAD, PLAINTIFF IN ERROR, *v.* JOHN BASKERVILLE, JOHN WHITE, JOHN PARKER, PETER HAYNES, WILLIAM STEWART, NANCY STEWART, NELSON B. TURNER, JACOB GALLASPIE, PETER BRYSON, BENJAMIN PARRISH, WILLIAM JOHNSON, REUBEN D. BROWN, THOMAS SAUNDERS, RICHARD WINN, THOMAS STONE, BEVERLY HEAD, DAVID CHENAULT, W. W. WEATHERHEAD, JOHN WEATHERHEAD, GEORGE T. BROWN, B. F. SHARP, AND FRANCIS ROGAN.

Where a will contained the following expressions: "my estate to be equally divided amongst my children," and also, "my lands and slaves to be equally divided amongst my children"; and had in it also the following clause: "to each of my daughters a small tract of land," — the last clause must be rejected as void and inoperative, and cannot be used for the purpose of showing such an ambiguity as would let in extrinsic testimony to explain the intentions of the testator.

When such testimony is introduced, it must be of facts unconnected with any general declaration or wishes expressed by a testator for the disposition of his property. In the present case, the testimony offered purported to express those wishes, and was therefore inadmissible.

Where the Circuit Court instructed the jury that they might consider the acts of one of the daughters and her husband, in acquiescing in a partition, and in receiving "a small tract of land," as a recognition of the true construction of the will to be, that the daughters were not entitled to an equal share, the acts of partition being accompanied by long adverse possession, say thirty or forty years, this instruction was erroneous. The daughter was a minor when she married, and continued covert until within a short time before she brought the suit. No presumption, arising from her acts, could therefore be made against her.

And a recognition by her, when freed from coverture, of a sale which she had made in conjunction with her husband, amounted to no more than a ratification of that particular sale.

So, also, an instruction was erroneous, that the jury might presume from the evidence that there had been a legal partition of the testator's land in respect to his daughters, by order of a court, when the executor assigned to them certain parts of it. By the laws of the State where the lands were, such a partition was a judicial act, and became a record.

The doctrine of presumption as to records, or proving their existence *aliunde*, explained.
In the present case, the proof is that the partition was not made by the order of a court.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Middle District of Tennessee.

The whole evidence given upon the trial in the Circuit Court was incorporated into the bill of exceptions, which must be inserted in this statement, and the preliminary narrative must therefore be brief.

On the 20th of July, 1788, Anthony Bledsoe was killed by the Indians under circumstances which are minutely detailed in the evidence. The will which was executed by him, whilst in great bodily suffering and surrounded by an alarmed family, was as follows: —.

"In the name of God, amen.

"Being near to death, I make my will as follows: I desire my lands at Kentucky to be sold, likewise my land on Holston, at the discretion of my executors; my children to be educated in the best manner my estate will permit; my estate to be equally divided amongst my children; to each of my daughters a small tract of land; my wife to keep possession of the four oldest negroes for the maintenance of the family; my lands and slaves to be equally divided among my children. I appoint my brother, Isaac Bledsoe, and Colonel Daniel Smith, executors, with my wife, Mary Bledsoe, executrix. At the decease of my wife, the four above negroes to be equally divided among my children

"ANTHONY BLEDSOE. [SEAL.]

"Signed, sealed, and delivered in the presence of us, this 20th of July, 1788.

"JAMES CLENDENING,
THOMAS MURRAY,
HUGH ROGAN.

"*State of North Carolina. — Sumner County Court, October Term*, 1788.

"The last will and testament of Anthony Bledsoe, deceased, was produced in open court, and proved by the oath of Thomas Murray and Hugh Rogan, subscribing witnesses thereto. Recorded and examined October 18, 1788."

At this time Bledsoe had ten children, viz. five sons and five daughters. After his death a posthumous daughter was born. Polly, who afterwards married Weatherhead, and was the plaintiff in error, was the eighth child.

In 1793, the executor and executrix (and after the death of

the executor, the executrix alone) conveyed to three of the daughters each a tract of land, by deeds of which the following is an example: —

"This indenture, made this 3d day of January, A. D. 1793, between Isaac Bledsoe and Mary Parker, executor and executrix of Anthony Bledsoe, deceased, of Sumner County, and territory of the United States, south of the river Ohio, of the one part, and David Shelby, of the county and territory aforesaid, of the other part, witnesseth: That they, said Isaac Bledsoe and Mary Parker, pursuant to the last will and testament of the said decedent, hath given and granted, aliened, enfeoffed, and confirmed, and by these presents doth give, grant, alien, enfeoff, and confirm, unto the said David Shelby, all that tract or parcel of land situate in the county aforesaid," &c., &c., containing 320 acres of land more or less.

In 1796 the records of the District Court of Mero District, on the equity side thereof, were burned and destroyed. This court had jurisdiction of the partition and division of estates and other matters in equity in the county of Sumner, where the lands were situated, from the time of making the will until the destruction took place.

In 1799 Polly, being then a minor, married Weatherhead, and immediately thereafter took possession of the 320 acres which were assigned to her.

On the 5th of January, 1801, the residue of the land which remained after giving the daughters 320 acres each was divided amongst the sons, by commissioners appointed by an order of Sumner County Court.

On the 19th of August, 1818, Polly Weatherhead and her husband sold to her brother, Henry R. Bledsoe, the tract of land which had been assigned to her, and shortly afterwards removed to Mississippi.

In 1843 Mr. Weatherhead died.

In October, 1846, Polly Weatherhead brought an action of ejectment in the Circuit Court of the United States for the Middle District of Tennessee, against the persons named in the titling of this report, for the whole tract of 6,280 acres. The defendants appeared, confessed lease, entry, and ouster, and at March term, 1847, the cause came on for trial. Under the charge of the court, which is set out in the bill of exceptions, the jury found a verdict for the defendants.

The following is the bill of exceptions.

"POLLY WEATHERHEAD'S LESSEE *v.* WILLIAM BASKERVILLE AND OTHERS.

"This cause came on to be tried before the honorable John

[illegible]

[illegible] and irregularity in the [illegible] and that the original will should be produced in court, and the said original will was produced accordingly: a copy of which, with the probate thereon, is hereunto annexed, marked A, and made a part of this bill of exceptions.

In admitting General Hall's evidence, he stated what Isaac Bledsoe and his wife had told him was the true will of Anthony Bledsoe. That is in substance, that each of the testator's daughters shall have a small tract of land, and that on his [illegible] repeating the statements of Isaac Bledsoe and his wife to Rogan, he said that the statement made to General Hall was about what had occurred in substance. Rogan having proved the will in the Sumner County Court in 1788, as a subscribing witness thereto, the court held that the will, according to the State laws of North Carolina, was *prima facie* established, and that a copy might be read by the plaintiff, and which was read accordingly. The court also held, that to make Rogan's proof valid, it must be presumed by the court and jury that Rogan proved all the necessary facts to constitute a good will to pass lands, the same as if Rogan then had proved the same facts before the jury. But that evidence might be let in on the trial to contradict what Rogan was presumed to have proved in 1788, before the Sumner County Court, when the will was there recorded. It was proved that Rogan had been dead for many years, and that the other subscribing witnesses were also dead. The copy was offered and admitted, and General Hall's evidence in opposition to the validity of the will adjudged to be proper, and heard to the extent above stated, in the progress of the trial, and one day before the original will was produced, on a *subpœna duces tecum*, issued on the part of the defendants to the officer having the same in his custody.

The defendants, except the two Stuarts, were proved to have been in possession at the time of bringing this suit. To the

reading of the original paper writing called the will, or so much thereof as contains the devise of the lands equally among his children, the defendants objected, and the plaintiff then proved the handwriting of Anthony Bledsoe and of the three subscribing witnesses, and that they were dead. It was also proved by the plaintiff that none of the sons of A. Bledsoe had taken possession of the Greenfield land until after the marriage of plaintiff.

"*Mrs. Shelby's Evidence.*

"It was proved by Mrs. Shelby, that her sister (the plaintiff) had always complained about not getting an equal share of all the lands of her father under the will, and that she returned from Alabama or Mississippi several times, and tried to have suit brought for it.

"*Dr. Shelby's Evidence.*

"It was proved by Dr. Shelby, that James Weatherhead had come into this country several times about this business, and claimed his wife's eleventh part of the land. There was no proof that this claim of wife or husband came to the knowledge of defendants, or those under whom they claim.

"*Malone's Evidence.*

"It was proved by William Malone, that, about fifteen years ago, a contract was made by the plaintiff, or her husband, with an attorney, to bring suit in this case, but being unable to give security for a fee of $600 then agreed upon, the suit was not brought and the thing failed; they came to this State several other times on this business, but could never get the suit commenced. It was also proved that James Weatherhead, the husband of the plaintiff, was an honest man, of good common sense, but deficient in energy and resolution. He was a 'good, easy man,' and died insolvent.

"*Hall's Evidence.*

"General William Hall was introduced by the plaintiff. He proved the boundaries of the grant, dated day of , 1787; that he surveyed the land called for in the grant; the number of acres called for in the grant is 6,280, but it held out 250 acres more; that all the defendants were in the possession of the land called for in this grant at the commencement of this action, except the two Stuarts; that the plaintiff, Polly Weatherhead, was a daughter of Colonel Anthony Bledsoe; he thinks in the fall of the year 1799 she intermarried with James Weatherhead, she then being under the age of twenty-one

years. Being cross-examined by defendants, states that he was well acquainted with Colonel A. Bledsoe, who was killed by the Indians in 1788; that his house stood within about six feet of the house of Colonel Isaac Bledsoe at the time A. Bledsoe was killed by the Indians; Ant. Bledsoe had a fort upon the Greenfield grant; Isaac Bledsoe at Bledsoe's Lick; the Indians had become very troublesome, and Ant. Bledsoe had broke up his fort, and moved into the fort of Colonel Isaac Bledsoe. Upon the night of the 20th of July, 1788, about the hour of midnight, the Indians approached the house of Isaac Bledsoe, and lay in ambuscade about forty yards in front of the passage dividing the house, and, with a view of drawing out those in the house, caused a portion of the Indians to ride through a lane rapidly by the house; upon which Anthony Bledsoe and his servant man, Campbell, arose, and walked into the passage, when A. Bledsoe and Campbell were both shot down. Colonel A. Bledsoe was shot with a large ball, which struck within a half inch of his navel, and passed straight through his body, coming out at his back; and from the great pain and rack of misery he suffered from the time he was shot till his death, he was satisfied his intestines were torn to pieces; he died at sunrise the next morning.

"The witness states that the firing of the Indians aroused him to his gun. He heard great lamentations in the house of Colonel A. Bledsoe, and he went down to the fort yard to ascertain who was shot; he was informed that Colonel A. Bledsoe and Campbell were mortally wounded, and some said that preparations were being made for writing his will. He, on consultation with others, concluded to put himself in a condition to resist an anticipated attack from the Indians, and returned to their portholes awaiting the attack, and there remained until about the break of day, when he went into the room where Colonel A. Bledsoe lay; he died about one hour afterwards; he did not hear Colonel A. Bledsoe speak on the subject of the will; he understood that he had made his will. Shortly after the burial of Colonel A. Bledsoe, he was still living in the fort with Colonel Isaac Bledsoe; he conversed with Isaac Bledsoe and his wife, Caty, on the subject of the will, and they both informed him that, shortly after Colonel A. Bledsoe was shot, they knew from the character of the wound that he must shortly die; Caty went to her husband, Isaac Bledsoe, and told him he must see his brother, and suggest to him that he must die, and that some provision should be made for his daughters; for if he should die without a will they would get no land, and the chief of his estate consisted in lands; that this suggestion was immediately made to Anthony Bledsoe by Caty Bledsoe,

in the presence of Isaac Bledsoe; and Anthony Bledsoe said to his brother, that, if he would get pen and ink, he would make his will; Isaac Bledsoe said he stepped to the passage and called Clendening from the other room, and he told Clendening that he must come and write his brother's will; that he himself was so confused and agitated that he could not write it himself; they got a table and placed it near him, and while Clendening was writing the caption of the will, Anthony Bledsoe observed to Isaac Bledsoe that he wanted him and Colonel Daniel Smith and his wife to act as executors and executrix of his will, as he intended to leave considerable discretion with him in carrying out his will; Anthony Bledsoe was suffering great pain, and Caty Bledsoe got up behind him in the bed, and supported him till the will was finished. Isaac Bledsoe said to Colonel A. Bledsoe, Mr. Clendening is ready to write your will, how do you want your property disposed of? And Bledsoe stated to Clendening, that he wanted to leave a small tract of land to each of his daughters, at the discretion of his executors, and the balance of his lands to his sons, except his land on Holston and in Kentucky, and them he wished to be sold to raise and educate his children; and the balance of his property to be equally divided between all his children, except the four oldest negroes, and them he wished to remain with his wife till her death, and then to be equally divided among his children. He shortly after saw Hugh Rogan, a subscribing witness to the will, who lived within the fort till 1793, and had a conversation with him in regard to the will of Colonel A. Bledsoe; and detailed to him what Colonel Isaac Bledsoe and wife Caty had told him about the making of the will, the same that is above specified, and that Hugh Rogan then said it was about what A. Bledsoe said on that occasion, in substance. About the time that Isaac Bledsoe was about to lay off the land to the four oldest daughters, witness was present, to wit, in 1793; and witness asked him what he considered would be a small tract of land under the will, when Colonel Isaac Bledsoe observed to him that less than 320 acres would not make a good plantation, and that he intended to give his own daughters 320 acres each; and that he intended to assign to his brother's daughters 320 acres of the best of the land out of the Greenfield survey, and done so. Three of the deeds, marked Nos. 1, 2, 3, and made part of this bill of exceptions, to wit, to David Shelby, William Neely, and James Clendening, who had married three daughters, show the land out of the Greenfield tract assigned them. They immediately took possession of the land, all parties being well pleased. Clendening died on his in the year 1822, when it descended to his children; Neely

and Penny continued in possession of theirs till they sold, and their assignees yet remain in possession. Shelby continued in possession of his till his death, in 1822; Mrs. Sally Shelby sold it, and her assignees continue in possession to this day. Each of the tracts contains about 400 acres.

"General Hall further stated, that the plaintiff, Polly Weatherhead, married James Weatherhead, he thinks, in the fall of the year 1799, and immediately thereafter took possession of their 320 acres assigned them out of the Greenfield grant. She and husband continued in possession till they sold it to her brother, Henry R. Bledsoe. Their deed, of the 19th of August, 1818, is here exhibited, marked No. 5, as part of this bill of exceptions. Shortly afterwards Weatherhead and wife moved to Mississippi. He never heard her or him put up any claim to any other portion of the Greenfield tract, in opposition to the right of the boys, Henry R., Abraham, and Isaac Bledsoe, nor held any talk with her on the subject. The balance of the grant of the Greenfield tract, in January, 1801, was divided among the boys by the commissioners, as appears by the deed here exhibited, marked No. 7, as part of this bill of exceptions. Isaac Bledsoe took possession, for himself and brothers, of this land, before 1801; he thinks in 1799, but would not be certain; whether before or after the marriage of plaintiff, cannot say; he thinks the guardians of the boys and girls rented the Greenfield tract out from 1796, till Isaac Bledsoe took possession himself, but is not certain; that Abraham Bledsoe continued in possession of the land assigned him till his death, about 1816 or 1817; Henry R. Bledsoe of his till his death, in 1822; Isaac Bledsoe of his till he sold to David Chenault, the defendant, and John Patterson. The deeds are here exhibited, all of which is admitted; need not copy them. Since the year 1800, Isaac, Henry R., and Abram Bledsoe, and their assigns, have held the peaceable and adverse possession of said tract of land devised as aforesaid. Previous to the year 1818 there were extensive clearings and improvements upon the land of the boys; many houses erected; and from that period to the present time those clearings have been extended, and some very valuable brick buildings been erected and possessed by some of the defendants. The improvements of this land are extensive, valuable, and permanent, and have been made from the year 1800 up to the present time.

"*The Testimony of General William Hall, continued.*

"The defendants read the deed from Nathaniel Parker and Mary Parker, dated 30th January, 1796, for 640 acres of land,

which lies within the bounds of the Greenfield grant, as proved by the witness, General Hall, who stated that the executor of Anthony Bledsoe made the deed to take up a bond of Anthony Bledsoe to Hugh Rogan. The defendant Francis Rogan lives on the part of the Greenfield grant conveyed to his father, Hugh Rogan, as aforesaid. The defendants then read the bond of A. Bledsoe to Hugh Rogan, dated the 18th of April, 1783, referred to in the testimony of General Hall, exhibit No. 8; need not be copied. The deed is referred to, exhibit No. 9. The defendants read the deed from the executor and executrix of Anthony Bledsoe, to wit, Isaac and Mary Bledsoe, of the 6th of April, 1700, exhibit No. 10, to William Bowman. General Hall proved that he was present when this land was run out; that he saw the bond of Colonel Anthony Bledsoe, which was assigned to William Bowman for this land; and that the executor deeded this land to Bowman in discharge of the covenants of said land, and this land lies within the bounds of the Greenfield grant.

"The defendants read the grant of the State of North Carolina, dated the 27th of June, 1793, for 640 acres, and likewise read the entry of the 14th of February, 1784, upon which the grant was founded, exhibits No. 11 and 12; need not be copied. General Hall proved that the grant of Evan Evans lies within the bounds of the Greenfield grant. The defendants read the deed of release from the plaintiff, and Martha Patterson, the wife of James Patterson, to John Patterson, (said Pattersons married daughters of James Clendening and Betsey Clendening,) dated the 14th of August, 1846. General Hall proved that this release not only embraced the 320 acres assigned the plaintiff, but likewise 335 acres of land, lying within the bounds of the Greenfield grant, which is not sued for. A deed from Henry R. Bledsoe to John Patterson, Jr. was read, exhibit No. 14. General Hall proved that this was the tract assigned to the plaintiff. The record of the County Court of Sumner was read, showing that the guardians of the girls listed the 320 acres of the Greenfield grant from 1794 till their marriage; and the sons of Anthony Bledsoe, by their guardians, listed the balance of the Greenfield grant for the boys. General Hall proved that the taxes were paid accordingly as listed. General Hall proved that the plaintiff had some eight or ten children, the oldest about forty-eight years; some four or five sons-in-law; and that she and husband, on several occasions, have been in the county where the land lay, since their removal from the county, as before stated. General Hall proved the handwriting of Anthony Bledsoe to the original will; and likewise the handwriting of the three subscribing witnesses;

and that the said Rogan and Clendening were men of the very highest character for integrity and truth. The deposition of Mrs. Desha, which is to be copied as part of this bill of exceptions, was read by the defendants.

"The plaintiff's counsel objected to that part of General Hall's testimony in which he details what he may have heard Isaac and Caty Bledsoe and Hugh Rogan say in relation to the circumstances that attended the making of the will, on the ground that it was hearsay. But the court allowed it to go to the jury, to which the plaintiff excepts. The plaintiff objected to all the testimony tending to prove any thing, or state of facts contrary to the written will, or to show that any thing was omitted or inserted in the will through mistake.

"*Mrs. Read's Evidence.*

"The defendants introduced Mary Read. She proved that she was well acquainted with Colonel Anthony Bledsoe; he was her uncle. In the year 1788, her father, Isaac Bledsoe, was living in the fort near Bledsoe's Lick; it was very troublesome times with the Indians. Colonel Anthony Bledsoe had left the Greenfield tract, and was living in one end of my father's house. About midnight of the 20th of July, 1788, after the families had retired to bed, James Clendening announced that he had discovered some Indians near the houses. Colonel Anthony Bledsoe got up and went into the passage with Campbell, it being a clear moonlight night, when Campbell was killed dead, and Colonel Anthony Bledsoe mortally wounded by a shot from the Indians, the ball having passed directly through his body. I was in the house of Isaac Bledsoe, my father, at the time; there was difficulty in getting light; at length Hugh Rogan went to the kitchen and got fire; immediately after, Anthony Bledsoe was shot; he was drawn into the house, having fallen from the shot; when the light came, his wound was examined and discovered to be mortal; he was in extreme agony; no mortal could have suffered more; his intestines were shot and torn; and what is called his caul fat came out to a considerable length; he continued to suffer immensely till his death, which occurred about sun up next morning; there was great confusion in the room, great lamentation and grief among the family, and those present; with all, a momentary attack was expected from the Indians till day. Shortly after the light came, Anthony Bledsoe asked my mother, Caty Bledsoe, what she thought of his case. She told him he must inevitably die, and that he ought to make preparation for another world; he seemed to have a great deal of concern about that; after a little, my mother suggested to

him that four of his oldest children were girls, and if he died without a will his girls would get none of his lands, and the chief of his estate consisted in lands; and suggested the idea of his making a will, in order to make some provision for his daughters; he seemed to hesitate, and said he did not know who they would marry, but said in the presence of my father and mother, and others, that, if they would have it wrote, he would make a will.

"I distinctly recollect, that he said that he wanted his Kentucky and Holston land sold, and the proceeds applied to the education of his children; that he wanted a small tract of land given to his daughters, at the discretion of his executors; the balance of his lands to be equally divided among his sons; that the four oldest negroes to be kept by his wife during her life, and the balance of the property to be equally divided among all his children. James Clendening approached a table near where he lay, and commenced writing the will. I did not hear what he said when the will was writing, if he said any thing. I was present all the time, from the time the will was first suggested to him to the time of his signing his will; heard him make no other disposition of his estate, but that which is detailed above. My mother got behind Anthony Bledsoe, and held him up with her knees; he talked but little, was in extreme agony all the time; when he talked, he talked sensibly up to his death. I do not know whether the will was read over to him or not; he signed his name to it. My father, Isaac Bledsoe, was standing by him when my mother suggested to him the propriety of making the will; was present during the whole time of the writing of the will, and was over him when he died. I was about ten years of age at that time; the occurrences of that night made a deep and lasting impression on my mind; I recollect what was said and done more distinctly than transactions of late date, and this has been impressed upon my mind by conversations with others since. James Clendening, the drawer of the will, shortly afterwards married one of the daughters of Colonel Anthony Bledsoe; he and Hugh Rogan resided in my father's fort some four or five years afterwards; my father was appointed an executor with the widow, previous to his being killed by the Indians; in 1793, pursuant to the request and will of my uncle, he assigned to David Shelby, who had married Sally, the oldest daughter, a small tract of land, the boundaries of which contain about four hundred acres, as appears by the deed; the other three daughters, to wit, Betsy, who married James Clendening, Rachel, who had married William Neely, Susan, who had married William Penny, received and had assigned to them their por-

tions, as appears by their respective deeds signed by the executors in the year 1793, containing 400 acres of land, all of which was taken out of the Greenfield survey, covered by the grant of 1787, exhibited by the plaintiff in the cause. In addition to these four children, Colonel Anthony Bledsoe at his death had the following: Thomas and Anthony, both of whom, under age, were killed by the Indians in the year 1794, Anthony in April, and Thomas in October, 1794; Isaac, Polly, Abram, Henry, and Prudence, who was born after the death of her father, being eleven in number. David Shelby, James Clendening, William Neely, William Penny, Joseph Sewell, and James Weatherhead all married daughters of Colonel Anthony Bledsoe, and were smart business men, and some of them married fifty or sixty years ago. James Weatherhead married the plaintiff, Polly, she thinks in the fall of 1799, and the next year took possession of the 320 acres laid off to her out of the Greenfield tract, and continued in possession for many years, till they sold to Henry R. Bledsoe, her brother, as appears by their deed of the 19th of August, 1818, which is exhibited, marked No. 5. Sewell and his wife Prudence got a like portion of land assigned them, from the southeast corner of the grant; all of which portions they possessed and enjoyed till they were all sold, except Clendening's lot, which descended to his heirs. Clendening died in 1822; Isaac Bledsoe took possession of the balance of the Greenfield tract for himself and brothers about the year 1800, she is not positive whether it was before or after, and that portion was divided between them, as appears by the report of the commissioners in 1801.

"*Parker's Evidence.*

"Nathaniel Parker, a witness for defendants, proved that he has always resided near the Greenfield tract of land since the year 1796. That Isaac, Henry R., and Abram Bledsoe, and the defendants claiming under them, have had the possession of the lands sued for since the year 1799 or 1800, cultivating and improving the lands, building houses, &c., since that period. That James Weatherhead married the plaintiff in the fall of 1799. That they took possession of the 320 acres of land assigned the plaintiff, he thinks in the year 1800; that they were close neighbors of his; was intimate with them; James Weatherhead worked on his house; Penny, who married a daughter of Colonel Anthony Bledsoe, was his brother-in-law; he was well acqainted with Joseph Sewell, James Clendening, David Shelby, and William Neely, who married likewise daughters. They were all smart men. Weatherhead was an

acting justice of the peace for Sumner County for many years; David Shelby was the guardian of Polly Bledsoe, the plaintiff, and was the clerk of the County Court of Sumner for some thirty years, and pursued his own interest closely. That during all this intercourse and acquaintance, he never heard any claim on their part upon any portion of the Greenfield tract assigned the boys.

"*Carr's Evidence.*

"John Carr, a witness for defendants, proved the same facts in substance proved by Nathaniel Parker.

"It was proved by competent testimony, which the plaintiff does not require to be copied into this bill of exceptions, that a division was made of the residue of the Greenfield survey after taking out the shares assigned the daughters, the land conveyed to Rogan and Bowman, and the land covered by the Evan Evans grant, between the three remaining sons of Anthony Bledsoe, by partition in a court of record, and that possession was continued under this division, and the deeds made under it, till the bringing of this suit, there being a regular chain of title from said partition, which was made in 1801.

"It was further proved, that possession had been taken by said sons jointly in the year 1800, adversely. The plaintiff and her husband having in that year also taken possession of the 320 acres laid off to them by the commissioners, no written evidence of which was adduced.

"*McGavock and Hickman's Evidence.*

"It was proved by Jacob McGavock and Thomas Hickman, that the records of the District Court of Mero District on the equity side thereof were burned and destroyed in the year 1796; and it appeared by competent proof, that this was the court having jurisdiction of the partition and division of estates and other matters in equity in the county of Sumner, where the land in controversy lies, from the time of the making of the will to the date of the destruction aforesaid.

"It is admitted that the land in controversy exceeded the sum or value of two thousand dollars.

"*Charge of Court.*

"Whereupon the court charged the jury as follows:—

"We are first of opinion, that parol evidence may be heard to the following extent, in reference to the devises in the will of Anthony Bledsoe: The clause, 'to each of my daughters a small tract of land,' we regard as directly conflicting with the clause, 'my lands and slaves to be equally divided amongst

my children.' It is contended by the plaintiffs, that by these devises the daughters not only take equally with the sons the lands of the testator, but that an additional small tract is also given to each daughter. From the then state of the law of descents, which excluded the daughters, and from the number and circumstances of the testator's family and estates, we think this construction of the conflicting clauses cannot be adopted; but that the clause which gives to each of the daughters a small tract of land must be regarded as unmeaning and useless. That it stands in conflict with an equal division is undeniable. The question then is, whether this inconsistency on the face of the will authorizes proof extrinsic of the recorded paper, to show that it was the intention and will of Colonel Bledsoe to give the daughters each a small tract of land only, and not an equal share, as contended by the defendants. The distinct question for the jury to try is, whether Anthony Bledsoe's will was, that his daughters should each have a small tract of land and no more. To find this to be the true will, the jury must find that the clause, 'my lands to be equally divided amongst my children,' was not Anthony Bledsoe's will, but inserted without his instruction or knowledge, and contrary to his intention, wish, and will.

"A paper writing, purporting to be a man's will or deed, executed and proved according to the forms of law, shall always be deemed such, unless positive proof of the contrary is made out clearly. In the case of a devise, it must be shown that the testator's will and intention was different at the time of making the instrument, and that that will and intention was not embodied in the writing, either by fraud or mistake at the time; or, in other words, that that which he positively willed was wrongfully set down, either designedly, which would be fraud, or not designedly, which would constitute mistake; but both standing upon the same principle in law and in fact, in an issue of *devastavit vel non*; and on these principles the jury will proceed to consider the case.

"The witnesses state that Colonel Bledsoe was shot in July, 1788, on the premises in dispute, where his family resided, and where his wife and children continued to reside for many years thereafter; that he was shot by the Indians through the centre of the body, and his bowels torn to pieces. He was in his own fort, between two log-houses, in a passage, where he received the mortal wound and fell, another (his servant) being killed at the same fire; that he was carried into one of the houses. This was about midnight, and he died after daylight next morning, being in extreme pain, and writhing much all the time after he received the mortal wound up to the time when

he died. During this time Isaac Bledsoe, and especially the wife of Isaac, proposed to their dying brother to make a will; the main intention of which was, to make a provision for his daughters out of his lands, they being cut off by the statute of descents. That at the time there was extreme distress in the house; various women, children, and men in it, and much confusion; that James Clendening (who was in the fort with many others) was sent for (he being on guard) to write the will, and did so, at the bedside of the wounded testator; that the will was executed before daylight. These facts we understand to be undisputed; but whether they are or are not correctly stated the jury will judge, our object being to state only such an outline of the facts as to make the charge to the jury intelligible, as regards the application of the rules of evidence to the case submitted to the jury. They will take into consideration the situation of the testator, and all the circumstances that surrounded him, at the time he was making his will, that is, during the time that Clendening was writing it, all that was said to him after he was shot and before Clendening commenced writing the will, and all that the testator said and did during these times, and all that was said to him after Clendening commenced writing the will and before it was completed, in regard to its contents. The jury will next consider the conjoint acts of Polly Weatherhead and her husband, and the acts of all the other devisees of Anthony Bledsoe, in instances where the whole of the devisees (including said Polly and her husband) are concerned in dividing the estate of the said testator, and see how far they mutually recognized the true will to be, that each of the daughters should have a small tract of land, but not an equal division by the partition they actually did make amongst each other; and especially how far Polly concurred in these acts of partition, and in a mutual occupation of the lands each devisee took. These acts are evidence that is strengthened by the lapse of time, and of long acquiescence on the part of Polly, if the acts of partition were accompanied by long adverse possession, each devisee holding adversely, and for her or himself, the parcel of land partitioned to him or her, say for thirty or forty years, under the partition.

"If the jury find from the evidence that the will of the testator was, that each of the daughters should have a small tract of land and no more, and find that Polly had partitioned to her the 320 acres, out of the south side of the Greenfield tract, as such small tract, then she has no right to recover in this action.

"And as to the fact of a legal and binding partition among the devisees of Anthony Bledsoe, we think, and so instruct the

jury, that, if they believe the facts given in evidence, then they would be authorized to presume that a legal partition had been made, the evidences of which had been lost by the accidents of time, and that Polly Weatherhead had legally received her share of the lands of the testator. In regard to the statute of limitations, the jury is instructed that, if Polly Weatherhead, by her guardian, had a joint possession of the land in dispute with her brothers, all claiming as tenants in common, and that such joint possession continued up to the time of Polly's marriage with James Weatherhead, then the act of limitation has not barred her right of recovery, if she sued within three years after her husband's death.

"The jury is further instructed, that, if they find for the plaintiff, they must find for one eleventh part of so much of the land sued for as was partitioned to the brothers of Mrs. Weatherhead, unless the plaintiff has relinquished her right to some part of the same.

"In regard to that part of General Hall's evidence where he deposed as to what Isaac Bledsoe and his wife told him respecting the intention of the testator, and which statements of Isaac Bledsoe and his wife General Hall repeated to Hugh Rogan, the subscribing witness to the will, and who (with Thomas Murray, another subscribing witness) proved the will in the ordinary form in 1788, and which statement was affirmed by Rogan to be substantially accurate, the jury will consider the evidence as intended only to impair the proof of Rogan in so far as the alleged mistake in the will is assumed to exist; but General Hall's evidence being competent, the jury may ascertain how far it comes in support of Mrs. Read's statement, and the acts of the plaintiff and her husband, in affirmance of the mistake alleged to have been made by Clendening in drawing the will, if such acts there be. To which charge, the plaintiff, by her counsel, excepted.

"The jury then rendered a verdict for the defendants; and the plaintiff then moved the court for a new trial, which was refused. To all which decisions of the court, in the admissions of the evidence excepted to, and the charge of the court to the jury, and the refusing a new trial, the plaintiff excepts, and prays his bill of exceptions to be signed, sealed, and made a part of the record, which is done accordingly.

"J. CATRON,
M. W. BROWN."

Upon this bill of exceptions the case came up to this court.

It was argued by *Mr. Meigs*, for the plaintiff in error, and *Mr. Fogg*, for the defendants in error.

Mr. Meigs, for the plaintiff in error.

The lessor of the plaintiff, Polly Weatherhead, being one of the children of Anthony Bledsoe, the patentee of the land in dispute, claims title to an undivided eleventh part of it, under his will, which is in the following words: —

"In the name of God, amen. Being near to death, I make my will as follows:

"1. I desire my lands in Kentucky to be sold; likewise my lands on Holston, at the discretion of my executors.

"2. My children to be educated in the best manner my estate will permit.

"3. My estate to be equally divided among my children.

"4. To each of my daughters a small tract of land.

"5. My wife to keep possession of the four oldest negroes for the maintenance of the family.

"6. My lands and slaves to be equally divided amongst my children.

"7. I appoint my brother Isaac Bledsoe and Colonel Daniel Smith executors, with my wife, Mary Bledsoe, executrix.

"8. At the decease of my wife, the four above negroes to be equally divided amongst my children."

The defendants repel her claim by alleging that the word *children*, in the third and sixth clauses of the will, was inserted instead of the word *sons*, by the mistake of the draughtsman. And out of this the first question arises, viz.: —

1. Whether parol evidence is admissible to prove the error of the draughtsman, and to correct it, either by inserting the word *sons* instead of the word *children*, or by striking out the clauses in which the word *children* is inserted; in which case the lands would pass to the sons by the then law of descents in Tennessee.

For the lessor of the plaintiff, we insist that this evidence was erroneously admitted by the Circuit Court. And in support of this position, out of the numberless cases in the books, we shall cite only three, one of them having the merit of being directly in point; namely, Weatherhead *v.* Sewell, 9 Humphreys, 272, 303, decided by the Supreme Court of Tennessee, at December term, 1848, upon this very will; and the other two, Newburgh *v.* Newburgh, 5 Madd. 364, and Miller *v.* Travers, 8 Bingh. 244, both being closely analogous to our case. For a classification of all the cases, see Wigram on Wills, a treatise approved by the highest authority in England; Doe d. Gord *v.* Needs, 2 Mees. & Wels. 129; 1 Spence's Eq. 554; Sugden on Property, ch. 2, § 1, arts. 4, 5, 9, 17; and America, 1 Greenleaf's Ev. §§ 287, 291, and notes.

Besides admitting the testimony of witnesses to alter the

will, the Circuit Court charged the jury to consider the conjoint acts of the plaintiff and her husband, and the acts of the other children, in instances where they all concurred in dividing the estate; and, from the partition they actually did make amongst each other, see,—

1st How far they mutually recognized the true will to be, that each of the daughters should have a small tract of land, but not an equal division; and

2d. Especially, how far the plaintiff concurred in these acts of partition, and in the mutual occupation of the lands each devisee took.

The jury were then told, that these acts of the plaintiff in recognition of the partition actually made, and of concurrence and long acquiescence therein, and in the possession held accordingly, were evidence strengthened by lapse of time, that the will was, that each of the daughters should have a small tract of land.

This is but to say, that we are to learn what a will is, not from the face of it, but by the glosses put upon it by contemporaries, and that we may gather those glosses from circumstantial evidence, as well as from the direct swearing of witnesses.

2. The court next instructed the jury, that, if they believed the facts given in evidence, then they would be authorized to presume that a legal partition had been made, the evidence of which had been lost by the accidents of time; by which partition the plaintiff legally received her share of the testator's land.

Here I take the meaning of the court to be, that, supposing the will to give her one eleventh part of the land, the jury may presume, from the facts in evidence, that a partition was legally made, assigning the plaintiff such part.

Be it so, for the sake of argument; then the defendants are in the adverse possession of her share in severalty, and are not tenants in common with her; and unless they are protected by the statute of limitations, or by lapse of time, she must recover.

But they are not protected by the statute of limitations, because the evidence shows that the adverse possession did not commence till after her marriage, she and her brothers having held in common till that event.

Are they protected by lapse of time? They are, if conveyances can be presumed from her to the defendants.

"But no case can be put in which such a presumption has been made, except where a title has been shown by the party who calls for the presumption, good in substance, but wanting some collateral matter necessary to make it complete in point

of form. In such cases, when the possession is shown to have been consistent with the existence of the fact directed to be presumed, and in such cases only, has it ever been allowed." Per Tindal, C. J., in Doe d. Hammond *v.* Cooke, 6 Bingham, 174; 1 Greenleaf's Ev. § 46.

In Doe d. Fenwick *v.* Reed, 5 Barnwell and Alderson, 232, it appeared that, in 1752, an ancestor of the defendant had been put in possession of the land in question as a creditor under a judgment against the then owner, which possession continued in the defendant and his family down to the time of trial, in 1821, being sixty-nine years. It appeared also that the title-deeds, which, however, also related to other lands, had continued in the possession of the plaintiff's family, and that modduses had been paid by them for several estates, including some of the property in question.

On this evidence, Bayley, J. told the jury, that the real question for them to consider was, whether they believed that a conveyance to the defendant, or those under whom he claimed, had actually taken place; observing that the loss of a deed was less likely to take place than of a grant of a right of way; and that, during a portion of the period of the possession, two of the parties under whom the plaintiff claimed being married, no conveyance could have been made without levying a fine, which, being of record, might have been produced if it had existed.

The jury having found for the plaintiff, on motion for a new trial, the whole Court of Queen's Bench concurred in refusing the rule. Abbott, C. J., in delivering the judgment, said:—

"I am clearly of opinion, that the direction was according to law. In cases where the original possession cannot be accounted for, and would be unlawful, unless there had been a grant, the rule may, perhaps, be different. Here the original possession is accounted for, and is consistent with the fact of there having been no conveyance.

"It may, indeed, have continued longer than is consistent with the original condition; but it was surely a question for the jury to say whether that continuance was to be attributed to a want of care and attention on the part of the family under whom the plaintiff claims, or to the fact of there having been a conveyance of the estate. As the defendant's ancestor had originally a lawful possession, I think it was incumbent on him to give stronger evidence to warrant the jury in coming to a conclusion that there had been a conveyance.

"As to the judge's observations respecting the fine, I think he might properly tell the jury, that, under the circumstances, they would probably find a fine.

"In my opinion, presumption of grants and conveyances has already gone too great lengths, and I am not disposed to extend it further."

Again, in the case of Doe d. Howson v. Waterton, 3 Barn. & Ald. 149, where copyhold premises were surrendered to a charitable use in 1743, but it did not appear that the provisions of 9 Geo. II. c. 36, with respect to the enrolment of conveyances to charitable uses, had been complied with, it was held, in 1819, that is, after the lapse of seventy-six years, that the existence of a bargain and sale, and enrolment under the statute, could not be presumed from the possession since 1743. Lord Tenterden, C. J., there says:—

"It is said, in this case, that the court may presume, if necessary, that a bargain and sale and enrolment have been made. But no instance can be found where the courts have presumed that an enrolment had been made. I am of opinion, that no presumption ought to be made."

And Bayley, J., adds: "As to presuming an enrolment, if it had appeared that the rolls of Chancery had been searched, and a chasm had been discovered about the period of the surrender, it might have been sufficient. At present there is no evidence upon which such presumption can be founded."

Now for the application of these cases. According to C. J. Tindal's rule, no partition can be presumed in this case, because the defendants have not shown "a title good in substance, but wanting some collateral matter necessary to make it complete in point of form." The title shown by them is good in substance and form, being conveyances from the plaintiff's brothers. If the defendants had shown a good deed in substance from plaintiff's husband, signed by her, but wanting privy examination, or words of grant or release on her part, as in Melvin v. The Proprietors of the Locks and Canals on Merrimack River, 17 Pick. 255, 262, this collateral matter, necessary to make the deed complete in point of form, might have been supplied by presumption. Had the defendants produced such a substantially good, but formally defective deed, their possession would have been consistent with the existence of the fact to be presumed, and then the presumption is allowable, according to the other branch of C. J. Tindal's rule.

Further: A partition in Tennessee may be made by mutual conveyances where the parties are adult and can agree, or where they are minors or cannot agree, by bill in chancery, or by the summary method prescribed by the act of 1787, c. 17.

Supposing the first method to have been adopted in this case, the execution of the deed by the husband must have been proved by two witnesses, or acknowledged by him before the

County or Circuit Court of Sumner County, and acknowledged by the plaintiff on privy examination by the court, and minutes of the probate or acknowledgment and privy examination entered on the record, a certificate of this indorsed on the deed by the clerk, and then the whole recorded in the registry of deeds for the county.

Are we to presume, in the absence of evidence, that search has been made in vain for traces of these records; that no such records exist; and supply the whole, at a blow, by a presumption? If so, what ought the instruction to the jury to have been? According to the case of Doe d. Fenwick v. Reed, the court should have said to the jury: —

"The real question for you to consider is, whether you believe that a partition, by mutual deeds between the devisees, actually did take place; and, as this could not be without record of the proof, or acknowledgment of the deed and privy examination of the wife, some traces of which records probably exist, you should not presume the deed in the absence of evidence that such traces are not to be found. And the court is of this opinion, because the original possession of the defendants can be accounted for in this case without making the presumption in question, and was lawful, though no such partition was made."

If a partition by mutual conveyances ought not to be presumed in such circumstances, much less ought a partition by bill in equity, or by the summary proceeding prescribed by the statute, to be presumed. In the absence of the evidence of a search, without success, for any of those records, it is impossible to presume them. 3 Barn. & Ald. 149; Best on Presumptions of Law and Fact, §§ 39, 40, in 37 Law Lib. 47, 49.

But in this case the adverse possession commenced after the plaintiff's coverture. Now, in McCorry v. King's Heirs, 3 Humphreys, 267, 278, it appeared that George Gillespie, the grantee of the lands in question, on the 14th of December, 1793, devised in his will as follows: "I give and bequeathe to my well-beloved daughter, Jane Gillespie, her heirs and assigns for ever, the tract of land I bought of James and Charles McCartney, lying in Green County." After the death of the devisor, Jane, the devisee, married William King, by whom she had children, the lessors of the plaintiff. In 1803 King, without his wife in any manner joining him therein, conveyed to Hayworth the land sued for. In 1804 Hayworth conveyed to Copeland, and he in 1809 to McCorry, the defendant. Jane King, the devisee, died in January, 1828, and William King, her husband, in October, 1835, and on the 4th of February, 1837, the children of Jane and William King commenced an

ejectment against McCorry to recover the lands which he had possessed under the deed made by their father for thirty-four years. Upon this state of facts the court say:—

"It is insisted that the jury should have been instructed that they might presume, from the length of possession in this case, that the wife had properly conveyed; that her ancestor, the testator, had made a deed, or the State issued an older grant to the defendant, or to those under whom he claims. We are of opinion, that the judge of the Circuit Court, presiding at the trial, very properly withheld such instruction.

"When the circumstances of the case, the relation of the parties towards each other, or the condition of the title, obviate and repel the bar of the statute, we think it would be wrong in principle, and unsupported by precedent, to protect the possession by giving effect to the doctrine of presumption insisted on. It would operate, moreover, most unjustly. A tenant in dower might alien in fee, and live for sixty or seventy years afterwards. The heir could not enter or sue during her life, and the statute would not operate in favor of the alienee until seven years had elapsed after the death of the tenant in dower. Yet, if the doctrine of presumption was applied to the case, the alienee would have a good title in fee, not by the deed he had taken, but by another presumed in his favor for more than twenty years before the death of the doweress. The truth is, the doctrine of presumption, as well as the bar created by the policy of the statute, is founded upon the principle of laches in him who, having the right, power, and capacity to sue, and disturb, or recover possession, for a long time omits and neglects to do so.

"This doctrine, under such circumstances, to secure the repose of society, presumes, at length, that he who could and would not sue had parted with his right. But to presume against him who is unable to sue, whose right of action has not accrued, who has been guilty of no laches, that his title has passed from him, or from those under whom he claims, would be an application of the doctrine of presumption as novel, we think, as it would be mischievous. The husband sells the land of the wife and conveys in fee; the coverture continues for fifty years afterwards; the wife survives; she is within the saving of the statute; she brings her suit, and is told that the title has long since been lost by the presumption of a valid conveyance from her. Certainly this could not be tolerated."

So the Supreme Court of New Hampshire, after remarking that the doctrine of presuming a deed from long possession and acquiescence, has been established, in analogy to the pro-

visions of the statute of limitations, proceed to say, that, where a husband undertakes to convey land in fee, of which he is seized only in right of his wife, in such a case no presumption of a grant can be raised against the wife by her acquiescence during coverture, because she is not in a situation, and has no power, to interfere and avoid the act of her husband; and if she could, it might be his interest to prevent her. 4 N. Hamp. 327, 328, in the case of Barnard *v.* Edwards.

So in the case of the Lessee of Margaret Delancey *v.* McKeen, 1 Wash. C. C. 354, the lessor of the plaintiff, having survived her husband, sued for one hundred acres of land, part of a tract of one thousand acres that had been conveyed to her and her husband in 1771, by William Allen, her father. The defendant set up a title under a deed from the commissioners of forfeited estates, who sold the same as part of the estate of Andrew Allen, a son of William Allen, and brother of the plaintiff, he having been regularly attainted. His estates were sold in 1778, and the deed executed in 1779. The defendant proved that, in 1775, Andrew Allen entered into contracts for the sale of parcels of this land; that he offered the whole tract, including the one hundred acres sued for by plaintiff, for sale; that he received the consideration money for such parcels as he had sold; that these payments were made, sometimes to himself, sometimes to William Allen for his use; that, at one time, the plaintiff was in the room when a sum for part of the land was paid by the purchaser.

For the defendant it was urged, that these acts of ownership by Andrew Allen were sufficient to authorize the jury to presume a conveyance from Delancey and the plaintiff, his wife, to Andrew Allen, or, at any rate, an agreement to sell, which would be sufficient to pass an equitable estate to Andrew Allen; upon which, as well as upon legal estates, the act of confiscation operated.

To this Judge Washington answered: "The acts of ownership by Andrew Allen, set up as a title for the defendant, prove nothing against the plaintiff, who labored under two disabilities, coverture and absence beyond seas, until the year 1780 or 1781, when the joint estate vested in her by survivorship."

It is true that Judge Story, in Tyler *v.* Williamson, 4 Mason, 402, does say, that "the presumption is applied as a presumption *juris et de jure*, whenever by possibility a right may be acquired in any manner known to the law." And he adds; "Its operation has never yet been denied in cases where personal disabilities of particular proprietors might have intervened, such as infancy, coverture, and insanity, and, by the ordinary course of proceeding, grants would not be presumed."

But Angell, in his work on Adverse Enjoyment (p. 116), says: "Persons who labor under a disability, it would seem, are protected against the common effect of the rule under consideration, inasmuch as they are excepted in the statute in analogy to which the rule was established. Besides, as a prescriptive right is founded upon the supposition of a grant, it cannot be opposed to those whom the law does not allow to have the control and administration of their property." And in Watkins *v.* Peck, 13 N. Hamp. 377, the Supreme Court say, "that, notwithstanding the above remark of Judge Story, we are of opinion that no grant can be presumed from an adverse use of an easement in the land of another, for the term of twenty years, where the owner of the land was, at the expiration of the twenty years, and long before, incapable of making a grant, whether the disability arose from infancy or insanity." "Perhaps," they add, "a disability intervening during the lapse of the term, but not extending to the termination of the period of twenty years, might not be sufficient to rebut the presumption; but it would be absurd to presume a grant, where it was clear that no such grant could have existed." The Supreme Court of New York, too, 16 Johns. 214, in Bailey *v.* Jackson, even say, "that this is not like a statute bar, which having once begun to run will continue, notwithstanding a subsequent disability occurs."

Be this as it may, these citations are enough to show that Judge Story's remark is not supported, unless this presumption be, as he says in that place, a presumption *juris et de jure;* or unless, as Lord Mansfield said, 4 Burr. 2023, quiet possession alone, for twenty years, be a "flat answer"; or, as Eyre, C. J., in 1 Bos. & Pul. 400, styled it, a "complete answer, or bar to the action." This is to confound the well-established distinction between conclusive and rebutable presumptions, and to put the latter upon the same footing as prescription and the statute of limitations. Greenleaf's Evidence, § 46. And it is to be observed that Professor Greenleaf cites the case of Tyler *v.* Wilkinson, where he is treating of the title by prescription. Ev. § 17.

Finally, upon this point, inasmuch as presumptions of this kind are in truth but mere arguments, and depend upon their own natural force and efficacy in generating belief or conviction in the mind (Greenleaf's Ev. § 44), the charge should have been, as already suggested, in the words, substantially, of Bayley, J., in Fenwick's Lessee *v.* Reed, to wit: "The real question for the jury to consider is, whether they believe that a conveyance to the defendant, or those under whom he claims, was actually made." Whereas, in this case, the jury were told, that,

"if they believed the facts given in evidence, they would be authorized to presume that a legal partition had been made," &c.; and were left to infer, that, after presuming a partition, they could also go on to presume a conveyance from the plaintiff to the defendants, or to those under whom they claim.

3. But whatever the law of other States or countries may be, certainly the Supreme Court of Tennessee has declared the law of that State to be, that the evidence in question is inadmissible, and that the presumption called for by the defendants cannot be made. Weatherhead *v.* Sewell, 9 Humph. 272; McCorry *v.* King's Heirs, 3 Humph. 267.

"There are certain rules of evidence which may be affirmed to be generally, if not universally, recognized. Thus, in relation to immovable property, inasmuch as the rights and titles thereto are generally admitted to be governed by the law of the *situs*, and as suits and controversies touching the same, *ex directo*, properly belong to the forum of the *situs*, and not elsewhere, it would seem a just and natural, if not an irresistible conclusion, that the law of evidence of the *situs* touching such rights, titles, suits, and controversies must and ought exclusively to govern in all such cases. So, in cases relating to the due execution of wills and testaments of immovables, the proofs must and ought to be according to the law of the *situs*." Story, Confl. of Laws, § 630 b.

"And perhaps it may be stated as a general truth, that the admission of evidence and the rules of evidence are rather matters of procedure than matters attaching to the rights and titles of parties under contracts, deeds, and other instruments; and therefore they are to be governed by the law of the country where the court sits." Ibid. § 634 a.

Therefore, whether we regard the law of evidence touching titles to immovables as a part of the law of titles, or as part of the law of procedure, either way the law of Tennessee must prevail, and the charge of the Circuit Court was erroneous.

Mr. Fogg, for defendants in error.

The acts of Assembly of the State of Tennessee in regard to wills of land are those of April, 1784, c. 22, and October, 1784, c. 10, § 6. Probates of wills in the County Court are sufficient testimony of the devise of real estate, and attested copies may be given in evidence in the same manner as the originals; but the original will must be produced under the requisitions of the proviso of the sixth section of the act of October, 1784. The probate of the paper writing called the will of Anthony Bledsoe before the County Court of Sumner, in October, 1788, was

in common form, where the devisees and next of kin had no notice. Redmond *v.* Collins, 4 Devereux, 430–449. The mode in which the probate was made in the County Court is not stated. The statement of General Hall as to the declarations of Isaac Bledsoe, the executor, and his wife, which the General had communicated to Rogan, and which Rogan said was correct, was properly received before the original will was produced. If the plaintiff had only offered the original, and proved Rogan's handwriting, then probably the defendants could not have attacked his testimony; but with the copy, the plaintiff relied upon his evidence. He was not only a subscribing witness, but a witness who was sworn before the County Court, and stated, as is to be inferred, that he became a subscribing witness, in the presence of the testator and at his request, to this paper as his will, and that this was his will, when he knew what the instructions were. If he had been present to be cross-examined, the fact could have been shown by himself; as he was dead, it is shown by his own declarations to Hall that he contradicted the idea that this was the will of Bledsoe, and thereby the effect of the probate was in some degree impaired, although in a slight degree, and was proper to be submitted to the jury. The defendants held in their own right, by deeds of conveyance purporting to pass the legal title; they did not claim under the will. Blight's Lessee *v.* Rochester, 7 Wheaton, 535. This paper writing is introduced to show that the land sued for was devised to Mrs. Weatherhead, and that thereby she had a title to the same. The *animus testandi*, the design and intention that the particular paper should be the last will and testament of the deceased, is the great and essential requisite of a will. In a court of construction, the intention of the testator, as collected from a view of the whole instrument, is the guide to its correct exposition; so, in determining the *factum* of the will, the *animus testandi* is to be gathered from the whole circumstances of the case. In the words of Sir John Nichol in Zacharias *v.* Collis, 3 Phillimore, 179, "the *factum* of an instrument means not barely the signing of it, and the formal publication or delivery, but proof that he well knew and understood the contents thereof, and did give, will, dispose, and do in all things as in the said will is contained." It is not pretended that parol evidence can be admitted to contradict or vary the terms of a will, or to explain its meaning, except in cases of a latent ambiguity. This cannot be done by a court of law or equity, acting as a court of construction. Greenleaf on Evidence, § 275 et seq. But though you cannot resort to parol evidence to control the effect of words or expressions which the testator has used, by showing

that he used them under mistake or misapprehension, nor to supply words which he has not used, yet you may, upon an issue of *devisavit vel non*, prove that clauses or expressions have been inadvertently introduced into the will contrary to the testator's intention and instructions, or, in other words, that a part of the executed instrument was not his will. 1 Jarman on Wills, 354, 355, et seq. Hippesley *v.* Homer, Turn. & Russ. 48, note. The remarks of Sir John Leach in the case of Earl of Newburg *v.* Countess of Newburg, 5 Maddock, 361. 1 Greenleaf, § 284. In order to ascertain whether the land in controversy was devised to Mrs. Weatherhead, and whether this was the last will of the testator, it is right to consider all the circumstances constituting the *res gestæ* at the time of the execution of the paper. 1 Greenleaf, § 108. In Smith *v.* Fenner, 1 Gallison, 170, the declarations of the testator before and at the time of making a will, and afterwards, if so near as to be a part of the *res gestæ*, were admitted to show fraud in obtaining the will. In the case of Reel *v.* Reel, 1 Hawks, N. C. 248, it was decided that evidence was admissible of the declarations of a testator made at any time subsequent to the execution of the will, which went to show that the testator believed the contents of the will to be different from what they really are; or declarations by testator of any other circumstances which show that it is not his will are admissible. The same point was decided in the case of Howell *v.* Barden, 3 Devereux, 442; Hester *v.* Hester, 4 Devereux, 228. See also Mathews *v.* Warner, 4 Ves. jr. 186 to 210; Small *v.* Allen, 8 Durnf. & East, 147. The decision of the Supreme Court of Tennessee in Weatherhead *v.* Sewell et al., 9 Humphreys, 272, we contend, with great deference, proceeds upon the doctrine of refusing parol evidence to explain or add to a will in a case of construction, and does not apply to receiving evidence to show that no will ever existed. The evidence offered and received in this cause by the Circuit Court was legal evidence to show that there was no devise to complainant of an equal share of the land of Anthony Bledsoe, and the jury had a right to draw the conclusion that there was no will to that effect. The possession by defendants was for more than forty years, and none of the daughters or their husbands, as devisees, ever claimed under the will according to what is now contended for the plaintiff.

2dly. The Circuit Court did not err in their instructions to the jury upon the law of presumption. This question of presumption did not arise at all in the case decided in 9 Humphreys, before mentioned. The doctrine of presumption has been frequently discussed in the courts of Tennessee.

See Haines *v.* Peck's Lessee, Martin & Yerger, 228 to 237. Long-continued uninterrupted possession shall be left to a jury, as a ground upon which they may presume that deeds, grants, records, writings, facts, &c., which cannot now be produced, had formerly a legal existence. See 1 Meigs's Digest, p. 488, § 920, and cases there cited. Also, Chilton *v.* Wilson, 9 Humphreys, 399; Rogers *v.* Mabe, 4 Devereux, 188. In these cases, the defendants have had an adverse possession of more than forty years; partitions of the land sued for were made near fifty years before the suit was brought; the daughters and their husbands have had several possessions of the parts assigned to them, and large and valuable improvements have been made by defendants, and those under whom they claim, and the value of the land has increased near a hundredfold. David Shelby, who married one of the daughters, and who, in 1794, was guardian of Mrs. Weatherhead, and gave in her part of this land for taxes, was a man of great sagacity and intelligence, and clerk of the County Court of Sumner for more than thirty years. He never for himself claimed, nor did his wife after his death ever claim, any of the land except that which was assigned to her of the tract in controversy. Plaintiff and her husband lived on a part of this tract for near twenty years, and saw the other part claimed by strangers, who were making valuable improvements. In addition to all this, the records of the District Court of Mero were destroyed by fire in 1796, that being the court where bills for partition and settlement of estates of deceased persons would have been filed. Deeds of partition have been presumed in much less time. 5 Cranch, 262; 3 Phillips on Evidence, 357; 5 Monroe, 518; 3 Desaussure, 555; 2 Gill & Johns. 468. To this doctrine the only answer is, that Mrs. Weatherhead was a feme covert until 1843, and therefore the law of presumption does not apply. A married woman in England formerly could not make a deed, but could convey only by fine, which is matter of record. In this country she can convey by deed and private examination, which deed can be lost or destroyed, or she may be bound by partition ordered by a court of chancery, the records of which have been burned and destroyed. In Bunce *v.* Wolcott, 2 Connecticut, 27, one of the judges in delivering his opinion says: "Upon the point of presumption, I do not know that it is entitled to any weight. The feme covert and her husband were capable of conveying the property, it was their interest to do it on sufficient consideration, and the facts in this case warrant the presumption of their having done it." In Melvin *v.* Locks and Canals, 17 Pick. 255, the jury were allowed to presume, from certain facts and circumstances, that

a married woman had with her husband conveyed land, and that was in a case where, so far as appeared, the husband alone had conveyed.

In Barnard *v.* Edwards, 4 N. Hamp. 321, a right of dower accrued to a widow in 1797, who neglected to make any claim of dower until 1826; such neglect was held to be competent evidence to be submitted to a jury as proof of a release of the right, although she married again in 1798, and remained a feme covert during the residue of the time, and had resided out of the State during the whole time. Also Tyler *v.* Wilkinson, 4 Mason, 402.

In the Circuit Court, the case of McCorry *v.* King's Heirs, 3 Humphreys, 267, was cited to show that the principles of presumptive evidence would not apply to a feme covert, and it could not be presumed she had executed a deed. In that case the husband made a conveyance of the lands of the wife, she not joining therein. There the husband had estopped himself from suing, and the wife could not sue alone. The possession of the husband's vendee was consistent with, and subordinate to, the right of the wife and that of her heirs; the possession of the tenant for life was the possession of the remainder-man, and there was no adverse possession. See Guion *v.* Anderson, 8 Humphreys, 327. In the present case, Mr. Weatherhead, her husband, made no deed, and the defendants do not claim under him. That case therefore has no application, and where the facts and circumstances concur, a presumption can as well be made in the case of a feme covert as of one *sui juris*. On the doctrine of presumptions, see Angell on Limitations, 425 to 429; Greenleaf on Evidence, §§ 44, 45, *et seq.*

Mr. Justice WAYNE delivered the opinion of the court.

All of us agree — our learned brother who presided upon the trial of this case in the Circuit Court concurring — that so much of the testimony submitted to the jury, to show a different intention in the testator from that which his will discloses, was inadmissible. Weatherhead *v.* Sewell, 9 Humph. 272; Newburgh *v.* Newburgh, 5 Madd. 364; Miller *v.* Travers, 8 Bingh. 244; 1 Greenleaf on Evidence, 287, 289, and note.

But it was urged, as the *animus testandi* of a testator may be gathered from all the circumstances constituting the *res gestæ* of the execution of a will, that all and any of them may be used to prove that expressions and clauses were put into the will we are considering, contrary to the intention and instructions of the testator. Without denying altogether that proposition, or the illustration of it in the case of Hippesley *v.* Homer, Turn. & Russ. 48, we think it must be admitted,

that the testimony for such a purpose must be of facts unconnected with any general declaration, or wishes expressed by a testator for the disposition of his property by will. Strode *v.* Lady Faulkland, 3 Ch. 129; Brown *v.* Selwin, Cas. Temp Talb. 240. The only safe rule is, that, where a will is doubtful and uncertain, it must receive its construction from the words of the will itself, and no parol proof or declaration ought to be admitted out of the will to ascertain it. The testimony offered in this case is of that character. That which was offered is the testimony of Hall and Mary Read. Hall's in this particular is a hearsay narrative received by him from the executor, Isaac Bledsoe. On that account it will not be further noticed. Mary Read's is not admissible, for she admits that she did not hear what the testator said "when the will was writing, if he said any thing." She does not say that she heard the instructions given by the testator to Clendening, the draughtsman of the will. But she says "she recollects he said he wanted his Kentucky and Holston lands sold, and the proceeds applied to the education of his children; that he wanted a small tract of land given to his daughters at the discretion of his executors; the balance of his land to be equally divided among his sons." Such testimony is altogether inadmissible, either for the purpose of determining the *factum* of a will, or to ascertain its intention. "It would indeed be of but little avail to require that a will *ab origine* should be in writing, or to fence a testator round with a guard of attesting witnesses, if, when the written instrument failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied and its inaccuracies might be corrected from extrinsic sources." In another view her testimony was inadmissible. There is no such uncertainty in the will, that it cannot be carried into effect without the aid of extrinsic testimony. Those words which are supposed to make it so, being void and inoperative to convey any thing, when that has been determined, cannot be used to make something else in the will ambiguous, which is certain of itself. The words are, "to each of my daughters a small tract of land," immediately after the testator's declaration that he desired his estate to be equally divided among his children. *Estate* is a comprehensive term, including all real and personal estate, and *children* has a legal significancy, extending, as the case may be, to grandchildren and even illegitimate children, but never permitting the term *sons* to be substituted for it, unless such shall be the plain intention of a testator in his will in favor of sons to the exclusion of daughters. Again, the testator says in the will, "my lands and slaves to be equally divided amongst my children." In

both the terms are intelligible. They do not admit of a doubt, and must have their operation, notwithstanding there may be an intermediate expression without any legal efficacy or certain meaning. We do not think it necessary to examine further, in connection with this case, how far parol evidence is admissible in cases of wills; or for what ambiguities in a will extrinsic testimony may be used to explain them. The case does not call for either. In 1 Jarman, 349, ch. 13, will be found a clear and satisfactory chapter upon the admissibility of parol testimony in cases of wills, illustrated by adjudicated cases. Mr. Wigram has placed before the profession the subject of extrinsic testimony in cases of ambiguity in wills with such ability and minuteness, that it has become a treatise of authority with judges and lawyers in England and the United States.

We will now pass on to the instructions which the court gave to the jury, concerning those presumptions which they might make from the evidence, against the plaintiff, in consequence of her supposed acquiescence in what is called a partition of the testator's lands; and that they might also presume that it had been done by the order of a competent tribunal. In respect to the first, it must be remembered that the plaintiff was an infant when her father died, a minor when she married, and continued covert until within a short time before she brought this suit. Under such circumstance of disability to pursue her rights in her father's estate with the aid of the law, no presumption can rightly be made against her. The rule in such a case is, that, when a person is under a legal incapacity to litigate a right in a court of justice, and there has been no relinquishment of it by contract, a release of it cannot be presumed from circumstances over which the person has had no control, happening before the incapacity to sue has been removed. It is a general rule, having however a particular bearing in favor of married women, from the relations in which they are placed to property, and the legal disabilities resulting from coverture. It is not necessary to enumerate the latter. One of them is, that she cannot sue, without the assent and association of her husband, for any property which she owns, or to which she may become entitled in any of the ways in which that may occur. For this cause it is, that statutes of limitation do not run against them during coverture. The plaintiff here was protected by that of the State of Tennessee. No presumption could be made to defeat its protection, from any conduct imputed to her, or from her husband and herself having had for any length of time a part of the testator's lands in their possession, or from any sale made of it by her husband in which she may have joined. The law will pre-

sume it to have been done under the coercion of her husband. The fact mostly relied upon for the presumption, which the jury were told they might make, was her having united with her husband in making a sale to her brother of the land put into their possession by her father's executor, and that she subsequently acknowledged it when discovert. The last was no more than a correct avowal that it had been done, and that the deed was operative for so much of the land as it conveyed of that larger portion to which she was entitled out of her father's estate. Her brother, who had received a larger portion, knew very well with whom he was dealing, and the evidence shows that he could not have bought without knowing his sister's discontent with the division which had been made of the estate; and that her rights were only not asserted, to the extent of them, against himself and her other brothers, because she had no one to do for her, and could not then do for herself. We think that the exception taken to this part of the instructions must be maintained, and it is so, by this court.

The point still to be noticed is so much of the instruction given to the jury, informing them that they might presume from the evidence that there had been a legal partition of the testator's land in respect to his daughters by order of a court, when the executor assigned them certain parts of it. By the law of Tennessee, such a partition is a judicial act and becomes a record. It can only be proved as such records may be, and when it is alleged to have been lost or destroyed, its contents can only be reached by proofs of a certain and fixed kind well known in the law. In the proper sense of the term *presumed*, the records of courts are never so. The existence of an ancient record of another kind may sometimes be established by presumptive evidence. But that is not done without very probable proof that it once existed, and until its loss is satisfactorily accounted for. The rule in respect to judicial records is, that, before inferior evidence can be received of their contents, their existence and loss must be clearly accounted for. It must be shown that there was such a record, that it has been lost or destroyed, or is otherwise incapable of being produced; or that its mutilation from time or accident has made it illegible. In this last, though, not without the production of the original in the condition in which it may be. The inferior evidence to establish the existence of a judicial record must be something officially connected with it, such as the journals of the court, or some other entry, though short of the judgment or record, which shows that it has been judicially made. The burning of an office and of its records is no proof that a particular record had ever existed. It only lays the

foundation for the inferior evidence. If that cannot be got, the result must be, and is, that there has been an allegation of the existence of a record, without proof. There is no way of bringing it to the knowledge of others. Nor can it be said to be known certainly by him who asserts it. In this case, without any such proof, the jury was told that they might infer from the burning of the records of the county of Mero, and the conduct of the parties interested in the testator's lands, that there had been a partition according to law. If the instruction is put exclusively upon the want of proof to justify it, it could not be maintained. But it was contrary to the positive proof in the record. There is proof that the lands assigned to the daughters of the testator had been done by their uncle and their father's executor, without any legal order of partition. Hall says, Isaac Bledsoe, the executor, laid off the land to the four daughters of the testator in 1793. We will give his words. "About the time that Isaac Bledsoe was about to lay off the land to the four oldest daughters, witness was present, to wit, in 1793; and witness asked him what he considered would be a small tract of land under the will, when Colonel Bledsoe observed to him, that less than 320 acres would not make a good plantation, and that he intended to give his own daughters 320 acres each; and that he intended to assign to his brother's daughters 320 acres of the best of the land out of the Greenfield survey, and done so." The proof is positive, that the portions of that survey subsequently occupied by the daughters and their husbands were assigned to them by the executor upon his own construction of the will, and without any order for a partition by any court. It repels all contrary inferences from any other evidence in the case.

We have sought to put this case upon the plainest footing in the shortest way, and without much which might have been written in support of our conclusion, from an unwillingness to embarrass it with what might have been proper, but which is not necessary.

The judgment of the Circuit Court is reversed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Middle District of Tennessee, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

GEORGE W. PARKS, ADMINISTRATOR OF SAMUEL PARKS, v. JOHN ROSS.

In some of the States it is the practice, after the evidence for the plaintiff is closed, for the defendant to pray the court to instruct the jury that there is no evidence upon which they can find a verdict for the plaintiff.

This is equivalent to a demurrer to the evidence, and such an instruction ought to be given whenever the evidence is not legally sufficient to serve as a foundation of a verdict for the plaintiff.

Where the United States and the Cherokee nation agreed that the latter should emigrate across the Mississippi, and the former pay the expenses thereof, and the Cherokees undertook to conduct the movement entirely by their own agents, a person whose wagons had been hired could not hold the agent who had hired them personally responsible. The owner of the wagons knew that the agent was a public officer, and dealt with him as such.

Wherever a contract or engagement, made by a public officer, is connected with a subject fairly within the scope of his authority, it shall be considered to have been made officially and in his public character, unless the contrary appears by satisfactory evidence of an absolute and unqualified engagement to be personally liable.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Columbia.

It was an action brought by Parks for services rendered by Samuel Parks to John Ross, in the removal of the Cherokee nation to the western side of the Mississippi, in the years 1838 and 1839. The bills of exception set forth *in extenso* all the evidence offered by the plaintiff upon the trial. Some of this evidence consisted of long documents, which it is not deemed necessary to insert, although they were made parts of the bills of exceptions. Their contents will be sufficiently understood from the following narrative.

In the year 1838, the government of the United States was desirous to remove the Cherokee nation to their assigned habitation beyond the Mississippi River; and deputed General Scott to make an arrangement with them for that purpose. The Cherokees upon their part appointed an agent with plenary powers, as appears from the following preamble to some resolutions adopted by them in 1840:—

"And whereas, these conditions being fully settled, the special agents of the nation, acting on the nation's behalf, after having made divers appointments for the purpose of carrying it into effect, in order to condense the business, did delegate its entire superintendence to one of their body, John Ross, and by John Ross such persons were deputed for the management of the various departments, on account of the nation, as were considered best qualified for the purpose," &c.

In order to ascertain the probable expense and amount of drafts necessary to be drawn upon the Treasury, General Scott caused the following estimate to be made out.

Estimate for the emigration of a party of one thousand Cherokees to their country west of the Mississippi, distance eight hundred miles, eighty days going: —

Fifty wagons and teams, (twenty persons to each wagon,) at a daily expense of $ 3.50, including forage,	$ 28,000.00
Returning, $ 7 each, for every twenty miles,	14,000.00
Two hundred and fifty extra horses, forty miles each per day,	1,000.00
Ferriages, &c.,	1,000.00
Eighty thousand rations, at 16 cents each,	12,800.00
Conductor, $ 5 per day,	400.00
Assistant conductor, $ 3 per day,	240.00
Physician, $ 5 per day,	500.00
Physician returning, $ 15 for every hundred miles,	120.00
Commissary, $ 2.50 per day,	200.00
Assistant commissary, $ 2 per day,	160.00
Wagon-master, $ 2.50 per day,	200.00
Assistant wagon-master, $ 2 per day,	160.00
Interpreter, $ 2.50 per day,	200.00
	$ 65,880.00

General Scott explained the contract in this way: —

"The understanding of the parties was common and distinct, that the eighty days allowed for the removal of each detachment, by land, was a mere assumption of a basis on which to calculate, for the moment, the advances to be made by the United States on account of the movement, and to set it agoing. If the advances proved to be too great, the excess was to be paid into the treasury of the nation; if too little, on account of more time in the movement, the United States were to make up the difference from the trust fund."

The Cherokees were formed into thirteen detachments, and the removal commenced about the 1st of September, 1838; but in consequence of sickness amongst them, a drought in the country through which they had to pass, difficulties in crossing the Mississippi, and other embarrassments, the time of removal was extended to a much longer period than eighty days.

Samuel Parks was a citizen of the Cherokee nation, and John Ross hired from him four wagons and teams, to be attached to Detachment No. 11.

On the 18th of May, 1840, John Ross, styling himself "Principal Chief and superintending Agent of the Cherokee Nation for Cherokee removal," presented an account to the proper

office at Washington, claiming a balance due to the Cherokee nation of $581,346.88½. Amongst his vouchers was the following, being one of the expenditures incurred by Detachment No. 11, in which Parks was, with his teams: —

For hire of fifty-one wagons and teams, for 1,029 persons, from the 1st of November, 1838, to the 24th of March, 1839, inclusive, 144 days, at $5 per day, $36,720; allowance of 40 days for returning, at $7 per day each, including travelling expenses, $14,280, ... $51,000.00

In November, 1840, the Cherokees passed some resolutions, amongst which were the following: —

"Resolved, That the authority vested in the special agents, and continued by the act of union between the Eastern and Western Cherokees, passed at Illinois Camp-ground, on the 12th day of July, 1839, and by them conferred upon one of their members, John Ross, as superintendent, with a view to facilitate the duties required of them, be, and the same is hereby, approved and ratified.

"And further resolved, (in support of the aforesaid authority,) That by the Cherokee nation, through their national committee and council in national council assembled, it is hereby ordered that the aforesaid John Ross be, and he is hereby, directed and fully empowered to proceed to Washington city, and to urge a settlement of this claim with all possible expedition, and to apply for and receive from the government of the United States, in the name of the Cherokee nation, the balance due of $581,346.88½, as stated in the account of the emigration claim, in order that the business growing out of it may be brought to a final close."

On the 6th of September, 1841, Mr. John Bell, then Secretary of War, decided upon this claim, and allowed it, with certain deductions.

On the 17th of September, 1841, Ross received from the Treasury the sum of $486,939.50.

On the 13th of December, 1841, Ross settled an account with Parks as follows: —

"The Cherokee Nation to Samuel Parks, deceased, Dr.

For the services of four wagons and teams, in the emigration of the Cherokees in Captain Richard Taylor's detachment, commencing the 1st of November, 1838, up to the 24th of March, 1839, making 144 days, at $5 per day each, . $2,880.00

"Cr.

By cash advanced Samuel Parks, as per receipt on the rolls, ... $1,600.00

Balance due, ... $1,280.00

"Received of John Ross, Superintendent of Cherokee emigration, one thousand two hundred and eighty dollars, in full for the balance due of the above account.

"Signed in duplicate.

"Park Hill, Cherokee Nation, Dec. 13th, 1841.

"G. W. Parks,
Executor of Samuel Parks, deceased."

In December, 1842, the Cherokees called upon Ross for certain information, to which he replied that "he had no moneys in his hands subject to legislation."

In July, 1844, Parks brought an action against Ross in the Circuit Court of the United States for the District of Columbia. The declaration contained the common money counts. In March, 1848, the cause came on for trial, when the jury, under the instructions of the court, found a verdict for the defendant. Upon the trial, the defendant took two bills of exception to the admission of evidence, which were not argued in this court in the posture of the case, and which would not be inserted in this report, except that the plaintiff's bill of exceptions adopts them, and refers to the recapitulation of evidence contained therein.

"Before the jurors aforesaid retired from the bar of the court here, the said plaintiff, by his attorney aforesaid, filed in court here the following bills of exceptions, to wit: —

"*Defendant's First Bill of Exceptions.*

"George W. Parks, Administrator of Samuel Parks, *v.* John Ross.

"On the trial of this cause the plaintiff, to maintain the issue on his part, offered evidence tending to show that the plaintiff's intestate hired four wagons to be used, and the same were in fact used, in the emigration of the Cherokee nation to the west of the Mississippi, under the arrangement with General Scott, in the year 1838, and produced and read to the jury the account and receipt of the plaintiff, as follows (copied in pages 364, 365); and also offered to read in evidence the account presented by the defendant to the government of the United States, as follows (copied in page 364); with account of Detachment No. 11, in which detachment it was admitted the

said wagons were employed, and were part of the fifty-one wagons therein mentioned; and also the opinion and decision of Mr. John Bell, Secretary of War, thereon; and the preamble and resolutions of the Cherokee nation referred to therein (copied in page 364); and the requisition of the War Department; and the warrant on the Treasury; and the receipt of the defendant; to all which offered evidence the defendant, by his counsel, objects; but the court overruled the said objection, and permitted the same to be read; and the defendant, by his counsel, excepts thereto, and prays the court to sign and seal, and cause to be enrolled, this his first bill of exceptions, which is done accordingly, this 10th day of April, 1848.

"W. CRANCH,
JAS. S. MORSELL."

Defendant's Second Bill of Exceptions.

"GEORGE W. PARKS, Administrator of SAMUEL PARKS, *v.* JOHN ROSS.

"*Richard Taylor's Testimony.*

"On the further trial of this cause, and after the evidence contained in the foregoing bill of exceptions made part hereof, the plaintiff, further to maintain the issue on his part joined, gave evidence to show and prove, by Richard Taylor, (the said evidence being noted in writing by the defendant's attorney,) that he is a Cherokee, and was one of the delegates originally appointed by that nation to enter into an arrangement with the United States for the transportation and emigration of the said Cherokee nation to the country set apart for them west of Mississippi River; that he had charge of the business of generally superintending the wagons of one detachment, in which the wagons of the plaintiff's intestate were employed; that shortly after they arrived in the Cherokee country he was paid off by John Ross, and the accounts of all those whose wagons had been employed were settled and adjusted by the committee or delegates, and they were paid for eighty days' travel, and the balance was left unpaid till the money could be received from the United States; the committee or delegates of the emigration were all present with Ross; they were appointed by the nation in council, before they started for the West, and never delegated their whole power to John Ross, but always acted when they were needed. John Ross had a general order and power to pay the claims arising out of the emigration; he received the money and paid it out. Several years ago he paid over to the Cherokeee nation $ 125,000,

which had been saved from the expenses of the emigration; and being asked by the plaintiff what had become of the $180,000 received, he replied: Just before I left home to come to the United States, Mr. Ross made a final settlement with the nation of all the money received by him for the emigration; being asked by plaintiff, he says it was in writing, and plaintiff insists his answer is not evidence. He states that he is one of the executive council of the nation, and now a delegate from the nation to the United States.

"Being cross-examined he says: The only power Mr. Ross had to pay claims was to pay such claims as had been passed by the committee or delegates; that he does not know out of what fund Mr. Ross could have saved the $125,000, except the money received for return wagons; that no money ever was paid to any person, nor any claim ever presented by any person to the committee or delegates, for 'return wagon money'; that the witness himself made the contract with the plaintiff's intestate for the hire of his wagons, and no contract was made for, and no reference made to, any return wagons, for it was understood they were all to remain in the nation; that plaintiff's intestate married the sister of witness, and was a citizen of the Cherokee nation; that he sold and disposed of his wagons and teams in the Cherokee nation, except one, with which he returned to the State of Tennessee, for the purpose, as he stated to witness, of bringing out his family; he did not return, but died in Tennessee, and he never in his lifetime to witness, or with his knowledge, set up any claim for return wagons; and witness was present when the account of plaintiff's intestate was settled, and afterwards, when the full balance was paid to the plaintiff; that there were various incidental expenses not estimated for originally, but which had to be paid by the nation, growing out of the delays and other causes in the emigration; that they were paid by the nation, and witness does not know out of what fund they could have been paid, except out of the return wagon money; and witness believes, from the facts he has stated, that the money so paid over by Ross to the nation, and the incidental expenses of the emigration, were paid out of that fund.

"And thereupon, and after the testimony of the said Richard Taylor had been given, the plaintiff further offered to read in evidence from a certain printed document, purporting to be Senate Document 298, 1st Session 29th Congress, two certain papers as follows, marked B and C, (copied in record,) and to lay a foundation therefor gave to the court the following evidence (evidence of Burke and J. R. Rogers, copied in record); and the defendant objected to the admissibility of the

said papers so offered to be read in evidence, maintaining there was no sufficient foundation laid for them as secondary proof; but the court overruled his said objection, and permitted the same to be read in evidence, and the same was read accordingly, and the defendant excepts thereto, and prays the court to sign and seal this his bill of exceptions, which is done accordingly; and the same is ordered to be enrolled according to the statute, this 10th day of April, 1848.

" W. CRANCH,
JAMES S. MORSELL."

(Then followed Mr. Burke and Mr. Rogers's statements, which are omitted.)

Plaintiff's First Bill of Exceptions.

" GEORGE W. PARKS, Administrator of SAMUEL PARKS, *v.* JOHN ROSS.

" And the evidence stated in the foregoing bill of exceptions, made part hereof, having been read to the jury, the plaintiff rested; and thereupon the defendant prayed the court to instruct the jury, that, upon the whole evidence aforesaid, if the same shall be believed by the jury, the plaintiff is not entitled to recover in this action.

" Which instruction the court granted; to the granting of which the plaintiff, by his counsel, excepts, and prays the court to sign and seal this his bill of exceptions, which is accordingly done, this 11th day of April, 1848.

" W. CRANCH,
JAMES S. MORSELL,
JAMES DUNLOP.

Plaintiff's Second Bill of Exceptions.

" GEORGE W. PARKS, Administrator of SAMUEL PARKS, *v.* JOHN ROSS.

" And thereupon, and upon the whole evidence in the said first and second bill of exceptions of said defendant contained, made part hereof, the defendant by his counsel prays the court to instruct the jury, that, if the same is believed by the jury to be true, the plaintiff is not entitled to recover in this action; which instruction the court granted; to the granting of which the plaintiff, by his counsel, excepts, and prays the court to sign, seal, and enroll this his exception, which is accordingly done, this 11th day of April, 1848.

" W. CRANCH,
JAMES DUNLOP."

The counsel for the plaintiff sued out a writ of error, and brought the case up to this court.

It was argued by *Mr. Green*, for the plaintiff in error, and *Mr. Bradley*, for the defendant in error.

Mr. Green, for the plaintiff in error, contended that, apart from the testimony of Richard Taylor, it is clear from the evidence that the defendant claimed and received from the United States government the money "in trust" for those who were entitled to it by having furnished transportation; that the plaintiff's intestate was one of those who furnished transportation; and that defendant, having claimed and received the money, as trustee, is liable in this action. See 2 T. R. 370; Cary *v.* Curtis, 3 Howard, 247, 249; 1 Harris & Gill, 258.

But the Circuit Court treated the defendant as the head or executive of a foreign and independent nation, and held that, having received the money as such, he was responsible only to the nation, and could not, *jure gentium*, be personally liable.

This he contended was clearly a mistake both of the facts and of law, and referred to the Cherokee resolutions and to 5 Peters, 1.

If it be contended, on the strength of Taylor's evidence, that the defendant has paid over to the nation, and thereby discharged his liability, it is answered, that defendant could not discharge himself by any settlement with or payment over to the nation, after notice, and pending this suit. See 10 Peters, 158; Bend *v.* Hoyt, 13 Peters, 263, 267.

But there is no evidence that defendant has paid over to the nation; the only evidence to that effect is found in Taylor's testimony, as follows: "Just before I left home to come to the United States, Mr. Ross made a final settlement with the nation of all the money received for the emigration." This does not say that he paid over to the nation the amount received on account of Parks's wagons, or that he showed any voucher of payment to Parks. He might have paid to the nation all except the amount due Parks, and said that he retained that on account of this very pending suit. Moreover, Taylor's evidence shows that the settlement was in writing. Then the written account or a duly certified copy should have been produced (1 Greenleaf's Evidence, 82, 84, 88), and the plaintiff had a right to rule out his evidence on this point.

The statement made by the witness, Taylor, that "the committee or delegates of the emigration never delegated their whole power to John Ross," is contradicted by the Cherokee resolutions of the 11th of November, 1840; and by a com-

parison of his testimony with the other evidence in the case, it will be seen that all the material statements therein contained, affecting the plaintiff's right to recover, were in conflict with, and disproved by, the other evidence in the cause. Though called to the stand by the plaintiff, the latter was not conclusively bound by his statements (11 Gill & Johns. 28; 1 Gill, 84; Greenleaf, § 443); nor were the jury, whose province it was to decide between the conflicting evidence.

It will be contended for the plaintiff, that, the evidence being contradictory, or conducing to different results, the effect of the instructions given by the Circuit Court was to withdraw from the jury their proper functions to determine the facts upon the evidence, and to take from them the right of weighing the effect and sufficiency of the evidence; and that, in so far as the instructions given by the Circuit Court were founded on the testimony of the witness Taylor, disregarding the conflict between that and the other evidence in the cause, said instructions were founded on part of the evidence only, and therefore improper. Greenleaf *v.* Birth, 9 Peters, 298; United States *v.* Tillottson, 12 Wheat. 181; Hurt *v.* Miller, 3 A. K. Marsh. 336; Browning *v.* Grady, 10 Ala. 999; 2 Gill & Johns. 403.

Mr. Bradley, for defendant in error.

The defendant will endeavor to show that the court did not err in giving the instruction.

There was no evidence legally sufficient to authorize the jury in finding any undertaking on the part of Ross to pay plaintiff's intestate for return wagons.

There was no evidence from which the jury could infer that Ross was personally liable therefor.

There was no evidence tending to prove the material fact of any contract, expressed or implied, between Ross and the said Parks, by which Ross became liable to pay for the return wagons.

The testimony in the cause is so slight and inconclusive, that no rational mind could draw the conclusion therefrom that Ross had come under obligation to pay the plaintiff the return wagon bill claimed by him. There was no evidence conducing to prove the issue on behalf of the plaintiff.

The rule in Maryland on this subject is well settled. The Court of Appeals of that State has said: —

It is the peculiar province of the court to determine all questions of law arising before them; and the undoubted right of the jury to find all matters of fact when evidence legally sufficient for that purpose is submitted for their consideration.

Tyson *v.* Richard, 3 Har. & Johns. 109; Dale *v.* Fassett, Lessee,

Ib. 119; Ford v. Gwinn, Ib. 496; Saunders v. Webster, Ib. 432; Benson v. Hobbs, 4 Har. & Johns. 285; Schwartz v. Tyson, Ib. 291; Benson v. Anderson, Ib. 315; Mercer v. Walmsley, 5 Har. & Johns. 32; and see Davis v. Davis, 7 Har. & Johns. 39; Coale v. Harrington, 7 Har. & Johns. 156; Gist v. Cockey, Ib. 140, 141; Barger v. Collins, Ib. 220; Riggin v. Patapsco Ins. Co., Ib. 295.

Where there is a failure of evidence in respect to any one material fact involved in the issue, the evidence is not legally sufficient to warrant the jury in finding the issue it is offered to sustain; and it is the duty of the court to instruct them accordingly. Cole v. Hebb's Admr., 7 Gill & Johns. 20.

To have granted such an instruction would have been to have authorized the jury to find a fact, of which no testimony legally sufficient to warrant such a finding had been submitted to their consideration. Chesapeake Ins. Co. v. Allegre's Admr., 2 Gill & Johns. 172.

"Where there is no evidence applicable to the issue, or tending to prove any material fact, a total failure of evidence, the court will direct the jury to find accordingly." Davis v. Barney, 2 Gill & Johns. 404.

"From the view which we have taken of the testimony in this cause, we cannot approve the instruction given to the jury. They were instructed, that they might draw conclusions and infer facts which the evidence before them was not legally sufficient to warrant them in finding." McNulty v. Cooper, 3 Gill & Johns. 219.

"Conceding that the court were right in admitting the evidence, their instruction is clearly erroneous, as they submitted to the jury the finding of a fact, of which no testimony legally sufficient for that purpose had been adduced before them. Thus they authorized them to find that the profits of the real estate had been applied to the maintenance of Elizabeth, her brothers and sisters, when not a scintilla of proof had been offered to show such application. On the contrary, the accounts showed that he had charged himself with them as part of the personal estate, and had either paid them away in satisfaction of debts and disbursements, or held them in his hands as part of the general balance of the intestate's personal estate." Burch v. Mundell, 4 Gill & Johns. 452.

Here the proof is, he had applied the return wagon money to incidental expenses in part, and had paid over the residue to the nation.

Where a plaintiff offers no testimony, or such as is so slight and inconclusive that a rational mind cannot draw the conclusions sought to be deduced from it, it is the right of the court,

and their duty, when applied to for that purpose, to instruct the jury that he is not entitled to recover. Morris *v.* Brickley, 1 Har. & Gill, 107.

This prerogative of the court is never exercised, but in cases where the evidence is so indefinite and unsatisfactory, that nothing but wild, irrational conjecture, or licentious speculation, could induce the jury to pronounce the verdict which is sought at their hands. Ferguson *v.* Tucker, 2 Har. & Gill, 189, 190.

See further cases in Maryland.

Sanderson *v.* Marks, 1 Har. & Gill, 252; Morris *v.* Brickley, Ib. 107; Caton *v.* Shaw, 2 Har. & Gill, 13; Smith *v.* Edwards, Ib. 411; Duvall *v.* Farmers' Bank, 7 Gill & Johns. 78; and Gray *v.* Crook, 12 Gill & Johns. 236.

And in this court.

The error complained of is, that the Circuit Court did not give an opinion on a point proposed; the court was certainly bound to give an opinion, if required, upon any point relevant to the issue. Douglass *v.* McAlister, 3 Cr. 297. But it is equally clear, the court cannot be required to give to the jury an opinion on the truth of the testimony in any case. Smith *v.* Carrington, 4 Cr. 62. It is the province of the jury to weigh and decide upon the sufficiency of the evidence. Where there is no evidence to prove a material fact, the court are so bound to instruct the jury, when requested; but they cannot take from the jury the right of weighing the evidence, and determining what effect it shall have. Greenleaf *v.* Birth, 9 Peters, 299; S. P. Ches. & Ohio Canal Co. *v.* Knapp, Ib. 567, 568; Scott *v.* Lloyd, Ib. 445, 446.

In trials at law, whilst it is invariably true that the decision of questions upon the weight of evidence belongs exclusively to the jury, it is equally true that, whenever instructions upon evidence are asked from the court to the jury, it is the right and duty of the former to judge of the relevancy, and by necessary implication, to some extent, of the certainty and definiteness of the evidence proposed. Irrelevant, impertinent, and immaterial statements a court cannot be called upon to admit as the groundwork of instructions; it is bound to take care that the evidence on which it shall be called to act is legal, and that it conduces to the issue on behalf of either the plaintiff or of the defendant. Roach *v.* Hulings, 16 Peters, 323.

Mr. Justice GRIER delivered the opinion of the court.

On the trial of this cause below, after the plaintiff had closed his testimony, the defendant's counsel requested the court to instruct the jury, "that, if the evidence is believed by the jury to be true, the plaintiff is not entitled to recover." This in-

struction was given by the court, and excepted to by plaintiff. Its correctness is the question for our decision.

It is undoubtedly the peculiar province of the jury to find all matters of fact, and of the court to decide all questions of law arising thereon. But a jury has no right to assume the truth of any material fact, without some evidence legally sufficient to establish it. It is, therefore, error in the court to instruct the jury that they may find a material fact, of which there is no evidence from which it may be legally inferred.

Hence the practice of granting an instruction like the present, which makes it imperative upon the jury to find a verdict for the defendant, and which has in many States superseded the ancient practice of a demurrer to evidence. It answers the same purpose, and should be tested by the same rules. A demurrer to evidence admits not only the facts stated therein, but also every conclusion which a jury might fairly or reasonably infer therefrom.

The question for our consideration is, therefore, whether the evidence submitted by the plaintiff in this case was sufficient to authorize the jury in finding any contract or undertaking, either express or implied, on the part of John Ross, the defendant, to pay the money demanded in the declaration.

A brief summary of the admitted facts of the case will, we think, sufficiently demonstrate the correctness of the instruction given by the court below, and that, if the defendant had demurred to the evidence in form, he would have been entitled to the judgment of the court.

The plaintiff's intestate was a citizen of the Cherokee nation. In 1838, a large portion of this nation, of which John Ross was the principal chief, had consented to emigrate to the west of the Mississippi River. The Cherokees were permitted to conduct their emigration by their own agents, the expense thereof to be advanced by the United States out of certain moneys or money due to the Cherokees by a former treaty. They accordingly appointed certain persons of their own nation as delegates or special agents to act in behalf of the nation. Of this agency John Ross was the chief, and acted as general superintendent. As such, he received large sums of money from the treasury of the United States for the purpose of defraying the expenses of the emigration, on estimates approved by General Scott. Among these estimates was one for hire of fifty-one wagons and teams, amounting in the whole to $51,000. In this amount was included an item of $14,280, as necessary to pay the hire and expenses of the wagons on their return, at the rate of seven dollars per day. The plaintiff's intestate was owner of four of the fifty-one wagons and

teams employed. After the emigration was ended, the delegates or agents of the nation settled the accounts, and among others that of plaintiff's intestate, who received the amount of his account and gave a receipt in full. Nothing was allowed him for return wagon hire in the account settled, and none was claimed by him, as he was himself a Cherokee, and intended to reside in the nation. Since his death, this suit has been instituted by his administrator, on the mistaken notion, that, because in the money of the nation received by John Ross there was included a sum of $14,280 estimated as necessary to pay return wagon hire, therefore the plaintiff's intestate was entitled to his proportional share of it, without any regard to the fact, whether the Cherokees were willing to allow it to him, or whether it was due to him on his own contract with their agents. There was no evidence whatever tending to show a special contract by John Ross personally to pay for the teams and wagons, either for going or returning. The contract of plaintiff's intestate was with the Cherokee nation, through their known public agents or officers. John Ross was the superintendent, treasurer, and disbursing officer. The money in his possession was the money of the nation; the plaintiff's intestate, and all who were employed in assisting the nation to emigrate, were fully aware that John Ross was acting as a public officer, and dealt with him as such.

Now, it is an established rule of law, that an agent who contracts in the name of his principal is not liable to a suit on such contract; much less a public officer, acting for his government. As regards him the rule is, that he is not responsible on any contract he may make in that capacity; and wherever his contract or engagement is connected with a subject fairly within the scope of his authority, it shall be intended to have been made officially, and in his public character, unless the contrary appears by satisfactory evidence of an absolute and unqualified engagement to be personally liable.

The Cherokees are in many respects a foreign and independent nation. They are governed by their own laws and officers, chosen by themselves. And though in a state of pupilage, and under the guardianship of the United States, this government has delegated no power to the courts of this District to arrest the public representatives or agents of Indian nations, who may be casually within their local jurisdiction, and compel them to pay the debts of their nation, either to an individual of their own nation, or a citizen of the United States.

The judgment of the Circuit Court is therefore affirmed, with costs.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

ABSALOM FOWLER AND NOAH H. BADGETT, APPELLANTS, *v.* AYRES P. MERRILL.

The act of Congress passed on the 24th of September, 1789 (1 Stat. at Large, 88, 89), provides that *ex parte* depositions may be taken before a judge of a County Court.

Where a Probate Court is organized for each county in a State, is a court of record, and has a seal, it is sufficient if a deposition under that act be taken before a judge of the Probate Court.

Although the day when a mortgage was executed was not stated, yet where it bore a date in its commencement, and its acknowledgment and date of record were both given, and both of them preceded a sheriff's sale of the mortgaged property, it was certain that the mortgage was executed before the sale under execution.

Although, when the mortgage was recorded, the laws of the State did not make the mere recording convey the title when the personal property thus mortgaged remained in the possession of the mortgagor, yet they sanctioned the mortgage unless it was made without good consideration, and opposed by a *bonâ fide* subsequent purchaser, who had no notice of its existence.

But the fact of recording the mortgage tended to give notice of its existence, and in the present case the evidence shows that the purchasers at the sheriff's sale had notice of the mortgage.

Such purchasers must allege that their want of notice continued up to the time of making actual payment; a want of notice merely extending to the time of making the purchase is not enough. Payment might have been refused, and then they would not have been injured.

Moreover, between the time when the mortgage was in fact recorded and the time of the sheriff's sale, the State passed a law making such recorded mortgages valid.

The increase or offspring of slaves belong to the owner of the mother.

The decree of the Circuit Court being that the purchasers at the sheriff's sale should either surrender the property to the prior mortgagee, or pay the value thereof, such value was properly computed as it was at the time of rendering the decree.

The hire of the slaves was properly charged as commencing when the prior mortgagee filed his bill for a foreclosure.

THIS was an appeal from the Circuit Court of the United States for the District of Arkansas, sitting as a court of equity.

It was a bill filed by Merrill, the appellee, against Fowler

and Badgett and other persons, under the following circumstances.

In April and June, 1837, N. L. Williams made the following notes: —

"$11,428 $\frac{22}{100}$. *Natchez, 1st April*, 1837.

"Two years after date, I promise to pay J. L. Dawson, or order, the sum of eleven thousand four hundred and twenty-eight dollars and twenty-two cents, value received. Negotiable and payable at the Planters' Bank of Mississippi, Natchez.

(Signed,) N. L. WILLIAMS."

"$1,150. *Natchez, 1st June*, 1837.

"Twelve months after date, I promise to pay J. L. Dawson, or order, eleven hundred and fifty dollars, value received, negotiable and payable at the Planters' Bank of Mississippi, Natchez.

(Signed,) N. L. WILLIAMS."

Making together the sum of $12,578.22.

These notes, indorsed by Dawson, were also indorsed by Merrill, and discounted for Dawson's use by the Planters' Bank of Mississippi at Natchez.

In order to secure Merrill, Dawson executed a mortgage to him of certain negroes then on the plantation of Dawson, in Arkansas. There were nine negro men, six women, and three boys included in the mortgage. As this mortgage was much discussed in the argument, it is proper to give its commencement and acknowledgment: —

"This indenture, made this 25th day of November, in the year of our Lord 1837, between James L. Dawson, of the county of Jefferson, State of Arkansas, of the one part, and A. P. Merrill, of the city of Natchez, State of Mississippi, of the other part, witnesseth: That the said James L. Dawson, in consideration of the debt to be secured, hereinafter mentioned, and of one dollar to him in hand paid by the said A. P. Merrill, the receipt whereof is hereby acknowledged, doth give, grant, bargain, sell, and convey unto the said A. P. Merrill, the following-described negroes, now on the plantation of the said James L. Dawson, known by the name of Woodstock, lying in the county of Jefferson, State of Arkansas, viz." &c., &c.

"To have and to hold the said negroes unto the said A. P. Merrill, his heirs and assigns, to the only proper use of the said A. P. Merrill, his heirs and assigns for ever. Provided, that if the said James L. Dawson, his executors and administrators,

or either of them, do pay, or cause to be paid, unto the said A. P. Merrill, his executors, administrators, or assigns, the just and full sum of $12,578.22, as mentioned in two certain notes of the following tenor, viz. No. 1, drawn by N. L. Williams, dated 1st April, 1837, at two years, for $11,428.22; 2 do. do., 1st June, 1837, twelve months, $1,150, indorsed by J. L. Dawson and A. P. Merrill, and payable at the Planter's Bank of Mississippi, Natchez, then these presents to be void; and the said James L. Dawson doth covenant with the said A. P. Merrill, that he, the said James L. Dawson, his executors, administrators, or assigns, shall and will pay, or cause to be paid, to the said A. P. Merrill, his executors, administrators, or assigns, the said sum of $12,578.22, as aforesaid, on the day above limited for the payment thereof.

"In testimony whereof, the said James L. Dawson has hereunto set his hand and seal, the day and year above written.

(Signed,) JAMES L. DAWSON.

"Signed, sealed, and delivered in the presence of —

"*State of Mississippi, Adams County.*

"Personally came before me, Judge of the Probate Court in and for the county aforesaid, the within-named James L. Dawson, who acknowledged that he signed, sealed, and delivered the within instrument in writing, as his act and deed, for the purposes and intents, and on the day and year, therein mentioned.

"Given under my hand and seal, this 24th day of November, A. D. 1837.

"C. RAWLINGS, *Judge of Probate.*"

On the 29th of December, 1837, this mortgage was recorded in Arkansas.

On the 12th of March, 1841, the President and Directors and Company of the Commercial Railroad Bank at Vicksburg, suing for the use of William W. Frazier, Thomas E. Robbins, and William S. Bodley, obtained a judgment against Dawson in the Circuit Court of Pulaski County (State court of Arkansas). The amount of the judgment was, —

Debt, ...	$9,688.00
Damages, ...	1,065.00
Costs, ...	8.95
	$10,761.95

On the 24th of April, 1841, a *fieri facias* was issued upon

this judgment, and levied upon certain lands and eleven of the negroes mentioned in the mortgage.

After an *alias* writ, the property was exposed to sale on the 11th of October, 1841. Fowler became the purchaser of some of the negroes, and on the next day the sheriff executed a deed to him, reciting the judgment and execution, and concluding thus:—

"Now, know all men by these presents, that I, John J. Hammett, as such sheriff as aforesaid, for and in consideration of the premises, and for and in consideration of the said aggregate sum of $2,966.66¼, to him, the said John J. Hammett, as such sheriff, in hand paid by the said Absalom Fowler, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and delivered, and do hereby grant, bargain, sell, and deliver, all of said slaves above described to the said Absalom Fowler, hereby conveying to him, and to his heirs and assigns for ever, all of the right, title, estate, interest, claim, and demand of the said James L. Dawson, of, in, and to the same. Not making myself hereby responsible for the title of said slaves, but only conveying, as such sheriff, the title of the said James L. Dawson in and to the same.

"Signed, sealed, and delivered, this 12th day of October, A. D. 1841. Interlined on second and third pages before signed.

"JOHN J. HAMMETT,
Sheriff of Jefferson County, Arkansas."

Badgett subsequently purchased some of these slaves from Fowler, and other persons, who were made defendants in the bill filed by Merrill, were purchasers at the sale.

On the 4th of March, 1842, Merrill paid the notes of Williams, which had been discounted for Dawson's use by the Planters' Bank of Mississippi.

On the 7th of September, 1842, Merrill filed his bill in the Circuit Court of the United States for Arkansas, against the following persons; viz. "James L. Dawson, who is a citizen of the State of Arkansas, but now temporarily residing in the Indian country west of the State of Arkansas, James Smith of Arkansas County, William Dawson of Jefferson County, Samuel C. Roane of Jefferson County, Samuel Taylor of Jefferson County, Nathaniel H. Fish of Jefferson County, Garland Hardwick of Jefferson County, Absalom Fowler of Pulaski County, Noah H. Badgett of Pulaski County, and all of whom are citizens of the State of Arkansas, and Sophia M. Baylor, who is a citizen of the State of Arkansas, but now

temporarily residing at Fort Gibson, in the Indian country, west of the State of Arkansas."

The bill stated the circumstances mentioned above, and then averred that the defendants purchased the slaves with notice of the mortgage. It then specially interrogated Fowler and Badgett, among other things, as to whether they ever had actual notice of the mortgage, and if so, when; and also as to the value of the slaves at the time they came into their possession, and their value at the time of filing the bill; and as to the worth of their services or hire after they came into defendants' possession; and whether Jackson and other children were the issue of the mortgaged slaves; and also as to the identity of the slaves themselves.

Defendants answered, setting up a *bonâ fide* purchase, without notice, at the sheriff's sale, and denying, as far as they knew or believed, all of the material allegations of the bill, and alleging that the mortgage was fraudulent; that Dawson had remained continuously in possession of the slaves, contrary to the terms of the deed; that they did not know whether the slaves were the same, and denied positively that Jackson was the issue of any one of the mortgaged slaves. In response to the interrogatories as to the value, hire, &c., Fowler answered, that Eliza, one purchased by him, and sold to Badgett, died before the commencement of the suit; that, at the time he purchased them, they were worth about what he gave for them, to wit: Tom, $533.33⅓; Phœbe and Jackson, $666.66⅔; Mary and Henry, $500; Maria and her child, $600; Eliza, $466.66⅔; and that, since the sale, the value of slaves generally, and these also, had depreciated at least one fourth; and that their hire, deducting necessary expenses, was worth, per annum, for Tom $70, Maria $50, Mary $40, Phœbe $40; and for the others, nothing. Badgett answers, also, that Phœbe was worth $400, Eliza $350, Jackson $65, and that Eliza had died, &c., and that their hire was not worth more than $40 per annum.

The valuation preparatory to the sheriff's sale was as follows:—

	Valued at	Sold for
Tom, ...	$800	$533.33
Phœbe and Jackson, . .	1,000	666.66
Mary and Henry, . .	750	500.00
Maria and her child, . .	700	600.00
Eliza, ...	700	466.66

It is not necessary to trace the progress of the suit through

its various steps. Many depositions were taken under a commission, and otherwise, and exceptions to their admissibility filed. One of them, which is the subject of a part of the opinion of this court, will be particularly mentioned for that reason. The point, as raised and decided in the Circuit Court was as follows: —

"The fourth exception is, 'that the deposition of Henry D. Mandeville, taken at Natchez, on the 8th of March, 1845, was taken without any sufficient notice having been served on said defendants of the time and place of taking the same.'

"The answer to this exception is, that where a deposition is taken, according to the acts of Congress, at greater distance from the place of trial than one hundred miles, no notice is required. By the certificate of the magistrate before whom the deposition was taken, it appears that the witness lives more than one hundred miles from this place; that his certificate is competent evidence of the fact, is established by the adjudication of the Supreme Court in the case of the Patapsco Insurance Company *v.* Southgate, 9 Peters, 617. The court say: 'It was sufficiently shown, at least *primâ facie*, that the witness lived at a greater distance than one hundred miles from the place of trial. This is a fact proper for the inquiry of the officer who took the deposition, and he has certified that such is the residence of the witness. In the case of Bell *v.* Morrison, 1 Peters, 356, it is decided that the certificate of the magistrate is good evidence of the facts therein stated, so as to entitle the deposition to be read to the jury.' This exception is overruled.

"The fifth exception is to the competency of the evidence contained in the deposition of Mandeville. The decision of this exception will be reserved to the final hearing.

"The sixth exception is to the authority of the magistrate before whom Mandeville's deposition was taken. It was taken before Thomas Fletcher, judge of the Probate Court within and for the county of Adams, and State of Mississippi, and the inquiry is, whether he is authorized by the acts of Congress to take depositions. By the 30th section of the Judiciary Act of 1789, depositions *de bene esse* may be taken before any judge of a county court of any of the United States. Is Thomas Fletcher a judge of a county court of any of the United States? In order to decide this question, we must look into the laws of the State of Mississippi. That this court is bound to take notice of the laws of Mississippi is clearly settled by the Supreme Court of the United States in the case of Owings *v.* Hull, 9 Peters, 625. The court say, that the laws of all the States in the Union are to be judicially taken notice of, in the

same manner as the laws of the United States are to be taken notice of, by the Circuit Courts of the United States. Looking, then, into the laws of Mississippi, we find a Court of Probates established in each county of the State, with jurisdiction in all matters testamentary, and of administration of orphans' business; in the allotment of dower; in cases of idiocy and lunacy, and of persons *non compos mentis* (see § 18 of the 4th article of the Constitution, and the acts of the legislature of 1833, law 444). By the fourth section of the act it is provided, that the Court of Probate in each county shall procure a seal for said court, thereby constituting it a court of record.

"The question then is, Is this a county court? It is a court of record established in each county in the State, and styled 'the Probate Court of the County of ' I am clearly of opinion, that it is such a county court as is contemplated by the act of Congress, and that depositions may be taken before the judge thereof. The deposition of Mandeville is a deposition taken *de bene esse*, and may be read on the final hearing, unless the defendant shall show that the witness has removed within the reach of a subpœna after the deposition was taken, and that fact was known to the party, according to the decision of the Supreme Court in the case of the Patapsco Insurance Company *v.* Southgate, 5 Peters, 617. This exception is therefore overruled."

Roane and others of the defendants made a compromise with Merrill, which was sanctioned by the court, and the bill was dismissed as to Sophia M. Baylor.

On the 23d of August, 1847, the Circuit Court made a long explanatory decree, of which the following is the conclusion:—

"This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, to wit: That the bill, as to the defendant, Sophia M. Baylor, be, and the same is hereby, dismissed, with her costs, to be paid by her to the said complainant. And it is further ordered and decreed, that unless the sum of $18,934 shall be paid or tendered to the said complainant, or his solicitor, by the remaining defendants, or any or either of them, on or before the first day of the next term of this court, they, the said defendants, are from thenceforth to stand absolutely debarred and foreclosed of and from all right, title, interest, and equity of redemption of, in, and to the said mortgaged property in the bill mentioned, and a sale of said mortgaged property decreed, if a sale thereof shall be deemed expedient by this court. And the question of hire of the mortgaged property, of costs, and all other questions in the

cause not now decided, are reserved to the further decree of this court.

"And it is further ordered, that this cause be, and the same is hereby, continued until the next term of this court.

"At the next term of the court a final decree was passed, fixing the value of the slaves and their hire, sanctioning the compromise made by some of the defendants, ordering a restitution of the slaves held by the rest, or, in case of neglect or refusal to restore, holding them responsible for the assessed value of such slaves."

Fowler and Badgett appealed from this decree to this court.

It was argued by *Mr. Lawrence*, for the appellants, and *Mr. Addison*, for the appellee.

The points made for the appellants were the following.

The appellants insist that the deposition of Mandeville, taken on the 8th of March, 1845, ought to have been suppressed on their exceptions.

It was taken before a judge of the Probate Court of Mississippi, an officer wholly unauthorized by sect. 30 of the act of September 24th, 1789, to take depositions *ex parte*, or by any other act of Congress. See 1 Stat. at Large, pp. 88, 89, § 30.

And the argument of the court below, that, because in that State there is a Probate Court established in each county, it is necessarily a county court, within the meaning of the act of Congress, is conceived to be wholly inconclusive and untenable. Upon the same reasoning, a court would be bound to infer that the Circuit Court, or Board of Police, established there in each county, is a county court. And if inferences of this kind be indulged, what may not be inferred? (See Const. of Miss., art. 4.)

Indeed, this Board of Police, which is entirely distinct from the Probate Court, is the substitute and legitimate successor of an abolished county court, inheriting nearly all of its powers. See Const. of Miss., art. 4; Hutchinson's Miss. Code (A. D. 1848), p. 710.

And if there be no county court there, either in fact or in name, by what authority could the Circuit Court for the District of Arkansas presume one into existence? And especially under a statute (Act of 1789, § 30) which admits of no presumptions whatever; and under which depositions taken must always strictly and rigidly conform to its words, or keep closely within their literal meaning. Bell *v.* Morrison, 1 Peters, 351 et seq.; 1 Cond. R. 535; U. States *v.* Smith, 4 Day, 127.

And if it be insisted that the deposition was taken on interrogatories, it was equally inadmissible; because, in such case, the court must always name the commissioners. See Rule 67 of this court, regulating practice in equity.

And this deposition, as also his third and last deposition, ought to have been suppressed, for the incompetency of the matter contained in them. As to matters taken from the books of the Bank, the statements as to the protest, a letter of Dawson, &c., &c.; because he neither produced the originals and identified them, nor deposed that he knew the matters to be true, otherwise than that they were so on the books, &c. See State *v.* Rawls, 2 Nott & McCord, 332; Peake's Ev. 190; Doe *v.* Perkins, 3 Durnf. & East, 754; 1 Phil. Ev. (by Cowen and Hill), 289.

The depositions taken by Merrill, of Trapnall, Dorris, Walker, White, Bogy, and Hammett, ought to have been suppressed. They were to be taken on thirty-five interrogatories; only a part of which were propounded to each witness.

And the law is well settled, as it seems, that each and every interrogatory must be put to each and every witness, and answered by him, or the depositions cannot be read. Richardson *v.* Golden, 3 Wash. C. C. 109; Bell *v.* Davidson, 3 Ib. 332 et seq.; Dodge *v.* Israel, 4 Ib. 323; Kimball *v.* Davis, 19 Wend. 439; Brown *v.* Kimball, 25 Ib. 265; Withers *v.* Gillespy, 7 Serg. & Rawle, 16; Ketland *v.* Bissett, 1 Wash. C. C. 144; Winthrop *v.* The Union Ins. Co., 2 Ib. 12.

And upon the exclusion of the depositions excepted to, or only Mandeville's, Merrill has nothing remaining upon which his decree can stand; he has no case at all.

An absolute sale of chattels, where the possession remains with the vendor, is void as to his creditors. Sturtevant *v.* Ballard, 9 Johns. 337 et seq.; Meeker *v.* Wilson, 1 Gallis. C. C. 422; Ryal *v.* Rowles, 1 Ves. sen. 359; 2 Kent's Comm. 406–410; Hamilton *v.* Russell, 1 Cranch, 309; Clow *v.* Woods, 5 Serg. & Rawle, 278; Cunningham *v.* Neville, 10 Ib. 201.

Even a stipulation in the deed of sale, for the retention, unless satisfactory to the court, does not form an exception to the rule. 9 Johns. 337 et seq.; 2 Kent's Comm. 412; 5 Serg. & Rawle, 279; Divner *v.* McLaughlin, 2 Wend. 599.

And does not the same rule apply to mortgages of personal property, both at common law and under the statutes of frauds? 2 Kent's Comm. 406–412; Ryall *v.* Rolle, 1 Atk. 167; Worsley *v.* De Mattos, 1 Burr. 467; 5 Serg. & Rawle, 278; Fuller *v.* Acker, 1 Hill, (N. Y.) 475; 9 Johns. 340 et seq.; Smith *v.* Acker, 23 Wend. 653; 1 Gallis. C. C. 423; Look *v.* Comstock, 15 Wend. 246; Murray *v.* Burtis, Ib. 212; 4 Yerg.

541; 7 Ib. 445; Powell on Mortg. 23, 24; Cadogan *v.* Kennett, Cowp. 434; Conard *v.* Atlantic Ins. Co., 1 Peters, 449; Barrow *v.* Paxton, 5 Johns. 261; Thornton *v.* Davenport, 1 Scam. 299; 2 Wend. 599; 13 Serg. & Rawle, 131.

This is an absolute mortgage, on its face, containing no stipulation whatever that Dawson should retain possession.

And as such, it is a conveyance executed, and passed the legal title to the slaves to Merrill. Powell on Mortg. 23, 24; 1 Peters, 441; 1 Ves. sen. 359; 5 Serg. & Rawle, 283 et seq.; 20 Wend. 262.

And immediately on the execution of the mortgage, Merrill was entitled to the possession of the slaves, and to maintain a suit for them. Doe *v.* Grimes, 7 Blackf. 1; Rockwell *v.* Bradley, 2 Conn. 4; 14 Peters, 28; 12 Serg. & Rawle, 241; 3 Johns. Cas. 326; 2 Conn. 447; Newall *v.* Wright, 3 Mass. 152; 1 Freem. Ch. 473; Hobart *v.* Sanborn, 13 N. Hamp. (1st vol. 2d series), 227.

At any rate, as soon as the first note fell due, in 1838, Merrill's title became absolute at law, and he had a right to immediate possession. Spalding *v.* Scanland, 4 B. Monroe, 365; 12 Wend. 62; Robinson *v.* Campbell, 8 Missouri, 366, 616; 10 Johns. 481; Dexter *v.* Harris, 2 Mason, C. C. 531; 5 Cond. Rep. 655; 20 Wend. 262; 1 Branch, 270; 1 Hill, (N. Y.) 475; 7 Cow. 292; 6 Paige, Ch. 587, 596; Lansing *v.* Capron, 1 Johns. Ch. 617; Adams *v.* Essex, 1 Bibb, 150; Estabrook *v.* Moulton, 9 Mass. 258; Hopkins *v.* Thompson, 2 Porter, 435.

And his permitting Dawson to remain in possession, after such failure to pay the note first due, without disturbance, and without a stipulation in the deed to that effect, makes the whole fraudulent and void as to Dawson's creditors. Goder *v.* Standifer, 7 Monroe, 488; 2 Kent's Comm. 407–413; 1 Burr, 475; 4 Mass. 637; 15 Verm. (1 Slade) 135; Gardner *v.* Adams, 12 Wend. 298; Thornton *v.* Davenport, 1 Scam. 299; Semple *v.* Burd, 7 Serg. & Rawle, 288; 13 Ib. 131, 169.

Conveyances of slaves, at the time of the alleged execution of this mortgage, were required to be acknowledged or proved before the clerk of the Superior Court, of a Circuit Court, a justice of the peace, or other competent authority, within the county where one of the parties resided, and there recorded. Steele & McCampb. Ark. Dig. 267.

The conclusion of the court below, that it may be lawfully recorded without probate, is based on error; for the same act of October 1, 1804, upon which the conclusion was founded, places the probate before the record; and it is consequently a prerequisite. Steele & McCampb. Dig., p. 132, § 2, p. 454,

§ 1; Geyer's Digest of Laws of Missouri Territory, p. 127, § 2, p. 330, § 1.

And the mortgage being acknowledged before a judge of probate of the State of Mississippi, who was wholly unauthorized by any legislative act of Arkansas, such acknowledgment is a mere nullity, and so is the pretended registry. Richardson *v.* Randolph, 5 Mason, C. C. 116; Coale *v.* Harrington, 7 Har. & Johns. 155; Miller *v.* Henshaw, 4 Dana, 330; Eastland *v.* Jordan, 3 Bibb, 187; Shultz *v.* Moore, 1 McLean, C. C. 527; Johnston *v.* Haines, 2 Ham. 55.

And if it be such an instrument as was not by law required to be recorded, its registry gives it no validity. 1 Story's Eq. Jurisp. § 404; 5 Mason, C. C. 265; 1 Gilman, 331.

And, if not duly registered, it is void, as to Dawson's creditors, though they had notice of its existence. 4 Rand. 212; 4 English, (Ark.) 116, &c.; 5 Litt. 244; 1 Johns. Ch. 300; 4 Bibb, 79.

And a purchaser, under the creditor's judgment, occupies the same position as the creditor himself. Sands *v.* Hildreth, 14 Johns. 497; 4 Rand. 212; Hildreth *v.* Sands, 2 Johns. Ch. 35 et seq.; 7 Blackf. 68; 1 McLean, C. C. 39; 4 Wash. C. C. 137; 1 Paige, Ch. 508; 11 Missouri, 544; 2 Wend. 601.

And if improperly recorded, or the statute does not make the record notice, as it does not in this case, such registry is not constructive notice to purchasers. 1 Story's Eq. Jurisp. § 404; 5 Mason, C. C. 115, 265; Moore *v.* Hunter, 1 Gilman, 331; 1 McLean, C. C. 527; McIver *v.* Robertson, 3 Yerg. 84; Heister *v.* Fortner, 2 Binn. 44; 4 Dana, 330; Gann *v.* Chester, 5 Yerg. 208; 12 Smedes & Marsh. 266; Main *v.* Alexander, 4 English, (Ark.) 116; 1 Dana, 168.

Again, there is no legitimate proof in the record to show when the mortgage was executed. It must, therefore, be presumed to be included in the category and class of deeds mentioned in the following paragraph, under the act of 1838. And the only proof of the execution of the mortgage being the mere signature of Dawson, the legal presumption must be that it had no valid existence until the filing of the bill, and after defendants' rights accrued.

This mortgage, placing it in the strongest possible view in Merrill's favor, being unrecorded, fixed no lien in his favor as against Dawson's creditors, who had no notice of it. This is unquestionable. Soon after the alleged execution of the mortgage, to wit, on the 20th of February, 1838, the legislature of Arkansas passed an act, declaring that "all mortgages" "for personal property" should "be acknowledged before some person authorized by law to take the acknowledgment of deeds,"

and recorded in the county where "the mortgagor resides." And that such mortgage, when so filed for record, "and not before," should be a lien on the property. And that the recorder should "note, in the record, the precise time such mortgage was filed for record." See Rev. Stat. of Arkansas (A. D. 1838), p. 578, ch. 101.

Was it not incumbent on Merrill so to have this mortgage recorded? And was it not expressly embraced in this act by its general phraseology? If so, he having utterly failed to comply with it, this case comes directly within the decision of the Supreme Court of Arkansas in Main *v.* Alexander, 4 English, 116.

And the decisions of a State court, on its own statutes, is the rule for the United States courts. 13 Peters, 21, 63, 328; 2 McLean, C. C. 433; 1 Ib. 36; 6 Peters, 297; 5 Ib. 401.

Was actual notice proved?

Fowler positively denies notice in his answer; and this can only be overturned by one positive witness, and corroborating circumstances equal to another. 2 Stor. Eq. Jur. § 1428; Flagg *v.* Mann, 2 Sumn. C. C. 550; 5 Mason, C. C. 267, 268; 1 Greenl. Ev. § 260; Simpson *v.* Feltz, 1 McCord, Ch. 218; Hart *v.* Ten Eyck, 2 Johns. Ch. 92; Gres. Eq. (ed. of 1837), 156; 9 Cranch, 160; 20 Pick. 34; 10 Johns. 540; 5 Cond. R. 136; 1 Mason, C. C. 515; 1 Call, 280; 5 Peters, 111; Sug. on Vend. 550; 2 Wash. C. C. 199; 1 Cow. 703.

And it is submitted to the court, whether there is any witness at all, who has sworn positively to such notice; and if not, can a court infer it from the circumstances alone, however strong they may be, against the answer's positive denial? The respondent speaks of a matter within his own knowledge; the witnesses from their impressions, and belief from other mere circumstances, without any pretence of actual knowledge. And the answer, as evidence, must have the same weight as disinterested witnesses. Sturtevant *v.* Waterbury, 1 Edw. Ch. 444; Sug. on Vend. 550; Clarke's Ex. *v.* Van Reimsdyk, 9 Cranch, 160; 1 Greenl. Ev. § 260; 10 Johns. 542; 1 Cow. 743.

The only evidences of actual notice to Fowler, even at the sale, are, that he was in the crowd when Trapnall forbade the sale, and during the progress of the sale purchased some of the slaves; the beliefs of the testy Frenchman, Bogy; the thoughts and beliefs of White; the beliefs of Walker; and the impressions of Trapnall; none of whom testify positively, or with any degree of certainty.

Appellants insist, that such evidence does not even make a *primâ facie* case of notice; much less is it sufficient to over-

whelm the positive negative of the answer. Because the rule of law is, that, where witnesses state facts to the best of their knowledge and belief, impressions, thoughts, or understanding, without detailing the facts upon which they are based, or from which they were induced or derived, they do not even amount to negative evidence; they are not evidence at all. Woodcock *v.* Bennett, 1 Cow. 748 et seq.; Clason *v.* Morris, 10 Johns. 531; Bright *v.* Haggin, Hardin, 537; Van Dyne *v.* Tharpe, 19 Wend. 165; Smith *v.* Frost, 2 J. J. Marsh. 426; Andrews & Bros. *v.* Jones, 10 Ala. Rep. (New Series), 470; Ventress *v.* Smith, 10 Peters, 171; 1 McCord, Ch. 218; 4 Ala. Rep. (New Series), 48; 2 Comstock, 515; 5 Porter, 343; 1 Dana, 163.

Notice in fact must be such as to affect the subsequent purchaser with fraud. Curtis *v.* Lunn, 6 Munf. 44; 1 Stor. Eq. Jur. § 404; Dey *v.* Dunham, 2 Johns. Ch. 190; Grinstone *v.* Carter, 3 Paige, Ch. 423.

And the proof of it must be clear, undoubted, direct, and conclusive. 6 Munf. 44; 1 Stor. Eq. Jur. § 406; McNeill *v.* McGee, 5 Mason, C. C. 265; 2 Sumn. C. C. 550; Sug. on Vend. 730; 2 Pow. on Mort. 560, 562; Martin *v.* Dryden, 1 Gilman, 208; McMeechan *v.* Griffing, 3 Pick. 154.

Mere presumptions of notice, from rumors, &c., in Dawson's neighborhood, cannot attach to Fowler, who resided in a different county. 2 Sumn. C. C. 551.

The witnesses even disagree about whose encumbrance it was that Trapnall gave notice of; whether Merrill's, William Dawson's, or some other.

Even if the indefinite impressions, beliefs, and discrepances in the recollections of the witnesses, so manifest in their depositions, be deemed sufficient to fix notice in fact upon Fowler, at the sale; and there is no pretence that he had any until then; and the record shows that he resided in a different county, and could not, therefore, be affected by rumors in Dawson's neighborhood; such notice is utterly inoperative.

Because notice to a judgment creditor, or a purchaser under his judgment, of a prior assignment, or mortgage, of the debtor's property, where possession has not been taken under it, cannot affect the right of either. 1 Gallis. C. C. 419; Russell *v.* Fillmore, 15 Verm. 135; 4 Eng. (Ark.) 116; Warden *v.* Adams, 15 Mass. 236; 7 Serg. & Rawle, 288 et seq.; 13 Ib. 131, 169.

And such creditor, or purchaser under his judgment, although he receive actual notice at the sale under execution, will hold the legal title, whether of land or personalty, in preference to an unrecorded deed, or mortgage, executed prior to the judgment, or execution lien. Guerrant *v.* Anderson, 4 Rand. 212;

5 Yerg. 208; Hill *v.* Paul, 8 Missouri, 480; Reed *v.* Austin's Heirs, 9 Missouri, 729; Frothingham *v.* Stacker, 11 Missouri, 78; Garnett *v.* Stockton, 7 Humph. 85; Bingaman *v.* Hyatt, 1 Smedes & Marsh. Ch. 444; Martin *v.* Dryden, 1 Gilman, 218; McGowan *v.* Hoy, 5 Litt. 245; Helm *v.* Logan, 4 Bibb, 79; Farnesworth *v.* Childs, 4 Mass. 637; Main et al. *v.* Alexander, 4 Eng. (Ark.) 117; Semple *v.* Burd, 7 Serg. & Rawle, 289 et seq.; Stow *v.* Meserve, 13 N. Hamp. (1st vol. 2d series), 49; 15 Mass. 236; Coffin *v.* Ray, 1 Metcalf, 213; 1 Dana, 168; 13 Serg. & Rawle, 169.

A principle settled in the foregoing cases is, that where a *bonâ fide* creditor, without notice of a prior unregistered conveyance, obtains a lien by virtue of a judgment, attachment, or execution, subsequent notice, whether before or at the sale, cannot affect the purchaser or creditor, but he must in equity, as well as at law, hold the property against the former unregistered deed.

In this case, the lien was fixed when the execution was delivered to the sheriff. See Rev. Stat. of Ark., A. D. 1838, ch. 60, p. 378, § 24.

The court below appears to have thought that the answer did not contain a sufficient averment as to the payment of the purchase-money before notice, &c., and therefore no proof of notice was necessary. Fowler's answer does make substantially and fully such denial and averment.

And even if the answer were technically defective in this particular, it should have been excepted to, and a more perfect response obtained; but being replied to, the defect, if any existed, is waived. 1 Freem. Ch. 547; 5 Mason, C. C. 266.

The value of the slaves, and of their hire, decreed by the court below, is excessive beyond all reason, and in direct violation of both the law and the evidence.

The value ought to have been estimated as at the time of the decree, and their reasonable hire from the filing of the bill until that time. See 1 Brockenb. (Chief Justice Marshall) 515, Backhouse's Ad. *v.* Jett's Ad.

And in estimating the hire, all reasonable charges and expenses, such as taxes, medical attendance, clothing, raising of the children, &c., &c., ought to have been deducted. Mims *v.* Mims, 3 J. J. Marsh. 109; 1 Dana, 286.

These equitable rules were disregarded.

To arrive at a correct conclusion on this point, the answers must be looked to; and they, indeed, according to the well-settled rules of evidence in equity, furnish the only guide for the decree, as to value and hire.

The bill expressly interrogates both Fowler and Badgett as to their value when purchased, their value when suit was commenced, and of their continued hire. They answer expressly these interrogatories.

And there can be no question that their answers are responsive to the bill; and, as such, conclusive evidence in their favor, unless overturned by two witnesses, or one positive witness, with strong corroborating circumstances. See the authorities above referred to on this point; the elementary works and reports on equity *passim;* and especially the following cases: Woodcock *v.* Bennett, 1 Cowen, 742; 2 Sumner, 506; Mills *v.* Gore, 20 Pick. 34; 2 Story, Eq. Jur. § 1528; 9 Cranch, 160; Allen *v.* Mower, 17 Verm. (2 vol. N. S.) 68; Christie *v.* Bishop, 1 Barb. Ch. 115; Oakey *v.* Rabb, 1 Freem. Ch. 547; Pierson *v.* Clayer, 15 Verm. (1 Slade), 104; Russell *v.* Moffitt, 6 How. (Miss.) 309.

The answers, responding to these direct interrogatories, declare that the purchase-money paid by Fowler was then the full value of the slaves, and that their value had greatly depreciated since, at least one fourth, with the general decline in the price of slaves, and that their profits or hire had necessarily declined also; and further state the net value of their hire, after deducting the proper charges, expenses, &c. Have the answers been set aside by the necessary witnesses? The record will be sought for them in vain. None of the witnesses pretend to speak of their value after the sale; and those who speak of hire mention it in gross, without deducting the proper charges and expenses.

White says they sold for about what they were worth, and were appraised too high, fully sustaining the answers.

Bogy says, at the time they were valued, he thinks they were worth what they were appraised at; but cannot say what the precise value of either of them was.

The answer, then, fully sustained by White, equal to three witnesses, cannot be overturned by the solitary testimony of Bogy. Even if Hammett's evidence should not be suppressed, it is only two witnesses against the answer and White; and the latter must even then prevail, because the former lacks the strong corroborating circumstances. And there is no evidence at all militating against the answers as to the depreciation in value after the sale. Rowton *v.* Rowton, 1 Hen. & Munf. 101.

And the appraisement list cannot be brought in aid of Bogy. For it is not evidence. Lawson *v.* The State, 5 Eng. (Ark.) 36.

The answers, then, must be taken as true, and conclusively so, as to the value and hire; and the decree being for about

or more than twice as much as the answers disclose, must be reversed on that ground, if on no other, that a correct account may be taken.

The decree against Badgett is also erroneous, because it decrees him to pay the value of Jackson, without any proof that he was the issue of one of the mortgaged slaves, against the denials of the answers. And because it decrees him to pay the value of Eliza, who died before the institution of the suit. 1 Brockenb. 515.

And even if notice be fixed upon Badgett, it cannot affect him, if Fowler was a *bonâ fide* purchaser. Mitf. Pl. 224; 1 Atk. 571; 2 Bro. Ch. 66; 1 Stor. Eq. Jur. § 409; 6 Munf. 44; Boone *v.* Chiles, 10 Peters, 209; 3 Ala. (N. S.) 475.

The points raised by the counsel for the appellee were the following.

1. That the mortgage was executed by Dawson and received by Merrill in good faith, to secure the latter from loss on account of indorsements made by him for Dawson's accommodation.

2. That the notes were protested, and notice duly given and the notes paid by Merrill. Brandon *v.* Loftus, 4 Howard, 128.

3. That the laws of Arkansas in force in November, 1837, did not require mortgages of personal property to be recorded.

4. That under these circumstances the mortgage would be good, even against subsequent *bonâ fide* purchasers without notice, notwithstanding the mortgagor's continuing in possession of the mortgaged goods. Powell on Mortg. 42–44; Edwards *v.* Harben, 2 Term Rep. 587; Hamilton *v.* Russell, 1 Cranch, 317, 318; U. States *v.* Hooe et al., 3 Cranch, 73; Bank of Georgia *v.* Higginbottom, 9 Peters, 60; Shirras *v.* Caig and Mitchell, 7 Cranch, 34; Stone *v.* Grubham, Bulstrode, 225; Meggott *v.* Mills, 1 Ld. Raym. 287; Brooks *v.* Marbury, 11 Wheat. 78.

And notwithstanding the appellee did not take possession of the negroes immediately on the notes being protested. Lady Lambert's case, Sheppard's Touchstone, 67; 1 J. J. Marshall, 227; 2 Dana, 204; 8 Peters, 32, 33; 3 Cowen, 189; 2 Wendell, 600.

5. That the laws of Arkansas, in force in 1837, although they did not require, yet allowed the recording of this mortgage, and such recording operated as notice to all the world. Steele & McCampbell's Digest of Laws of Arkansas, titles "Mortgage," Recorder." See District Judge's Opinion in this case, pp. 188, 189.

6. That the appellants had actual notice at the time of their purchase of the existence of this mortgage, and their purchasing with such notice is fraudulent against the appellee, and they can derive no rights against the appellee through such purchase. Le Neve *v.* Le Neve, 3 Atk. 646; 1 Story's Eq. 395, 397; Wormley *v.* Wormley, 8 Wheat. 449.

7. That at all events the appellants had sufficient notice to put them on inquiry, which, if they failed to make, they cannot claim the rights appertaining to *bonâ fide* subsequent purchasers without notice. 1 Story's Eq. § 400, note 4, § 400 a.

8. That the answers of the appellants do not allege that they had no notice of the mortgage before the payment by them of the purchase-money, and such allegation is indispensable to a valid defence by subsequent purchasers. Frost *v.* Beekman, 1 Johns. Ch. 300; 2 Daniell's Chancery Practice, 814; Jewett *v.* Palmer, 7 Johns. Ch. 68; Harrison *v.* Southgate, 1 Atk. 538; Story *v.* Ld. Windsor, 2 Atk. 630; Wigg *v.* Wigg, 1 Atk. 384; Tourville *v.* Naish, 3 P. Wms. 306; Jones *v.* Thomas, 3 P. Wms. 244; Hardingham *v.* Nicolls, 3 Atk. 304; Wormley *v.* Wormley, 8 Wheat. 449.

9. That after hearing it is too late to apply for leave to amend the answer in this respect. Story's Eq. Pl. 896, 901. And there is nothing in the record from which it may be inferred that they could amend, or that they wanted leave to do so.

10. That Fowler only purchased Dawson's equity of redemption. 4 Randolph, 212.

The counsel for the appellants insists upon the following exceptions.

Mandeville's Deposition, 8th March, 1845.

1. Because no notice of its caption was given.

The appellee contended that none was necessary, because it was taken more than one hundred miles from the residence of the appellants. Act of 1789, ch. 20, § 30 (1 Stat. at Large, 89).

2. Because it was taken before a Probate Court.

The appellee contended, that it was a court within the meaning of the act of 1789, ch. 20, § 30. (See opinion of the district judge in this case, and the constitution and laws of Mississippi as there cited.) But even if it ought to have been suppressed, the same facts are sufficiently proven in his deposition taken before the Mayor of Natchez.

Depositions taken at Pine Bluffs.

1. Because the name of one of the defendants, J. L. Dawson, does not appear in the certificate of the commissioners.

The appellee contended, that the cause in which it was taken sufficiently appears. Keene *v.* Meade, 3 Peters, 1; Jordan *v.* Hazard, 10 Ala. 224.

2. (*a.*) Because sufficient notice was not given of the filing of the interrogatories.

The appellee will rely on the 13th Rule of Practice for the Equity Courts of the United States.

(*b.*) Because sufficient notice was not given of the time and place of taking the depositions.

The appellee contended, that, the commission being *ex parte*, notice was unnecessary. 1 Newland's Ch. Prac. 262; Harr. Ch. Prac., ed. 1808, p. 244; 1 Smith's Ch. Prac. 365.

3. Because each interrogatory was not propounded to each of the witnesses.

The appellee contended that this was unnecessary, and that it would have been irregular to have done so. Daniell's Ch. Practice, 1052, 1061; Gresley's Eq. Ev. 67, 104; 1 Turner's Ch. 32 (Introduction); 1 Smith's Ch. Prac. 368.

And the appellee contended, that, if the depositions taken at Pine Bluffs ought to have been suppressed, still without them there is in the appellants' commission, and in the other evidence, sufficient proof to entitle him to the decree as passed.

The appellants object, that the court improperly dismissed the bill against Mrs. Baylor.

The appellee contended, —

1. That there was not sufficient evidence to warrant a decree against her.

2. But that if the court did err in that respect, it operated no prejudice to the appellants, as the value of the negroes held by her, and their hire, would not, together with the several sums decreed against all the other defendants, be equal to the mortgage debt.

Mr. Justice WOODBURY delivered the opinion of the court.

This was an appeal from a decree of the Circuit Court of the United States for the District of Arkansas.

The decree was in favor of Merrill, on a bill in chancery to foreclose a mortgage of certain negroes, described therein and executed to him, November 25, 1837, to secure him for indorsing two notes made in April and June, 1837, the first payable in one year and the other in two years, for $12,578.42 in the aggregate. These notes run to F. L. Dawson or order, and were by him indorsed to the plaintiff, Merrill, and by him to the Planters' Bank for Dawson, who obtained the money thereon for himself. This mortgage was recorded December 29, 1837.

The notes not being taken up by Dawson, Merrill was compelled to pay their amount and interest, on the 4th of March, 1842.

The bill then proceeded to aver, that the defendants below, viz. James L. Dawson, James Smith, William Dawson, and others, had since got possession of these negroes, some of one portion of them and some of another. And that, although they were bought with full notice of Merrill's prior rights to them under the above mortgage, yet the respondents all refuse to deliver them to him, or pay their value and hire towards the discharge of the mortgage. Whereupon he prayed that each of them be required to deliver up the negroes in his possession, and account for their hire or to pay their value.

The court below decided, that $18,934 be paid to Merrill by the respondents, excepting Mrs. Bayler, and, on failure to do it, that the redemption of them be barred, and other proceedings had, so as eventually to restore the slaves or their value to the mortgagee.

Several objections to this decree and other rulings below were made, which will be considered in the order in which they were presented.

Some of the depositions which were offered to prove important facts had been taken before "a judge of the Probate Court" in Mississippi, when the act of Congress allows it in such cases before "a judge of a county court." 1 Stat. at Large, 88, 89.

But we think, for such a purpose, a judge of probate is usually very competent, and is a county judge within the description of the law.

In Mississippi, where these depositions were taken, a Probate Court is organized for each county, and is a court of record, having a seal. Hutch. Dig. 719, 721. Under these circumstances, were the competency of a probate judge more doubtful, the objection is waived by the depositions having been taken over again in substance before the Mayor of Natchez.

The other objections to the depositions are in part overruled by the cases of Bell *v.* Morrison et al., 1 Peters, 356, and Patapsco Ins. Co. *v.* Southgate et al., 5 Peters, 617.

On the rest of them not so settled, we are satisfied with the views expressed below, without going into further details.

The next exception for our consideration is, that the time of the execution of the mortgage is not shown, and hence that it may have been after the rights of the respondents commenced.

But it must be presumed to have been executed at its date

till the contrary is shown; and its date was long before. Besides this, it was acknowledged probably the same day, being certified as done the 24th of November, 1837. And though this was done out of the State, yet, if not good for some purposes, it tends to establish the true time of executing the mortgage. It must also have been executed before recorded, and that was December 29th of the same year, and long before the sale in October, 1841, under which the respondents claim.

The objection, that the handwriting of the record is Dawson's, does not impair this fact, or the legality of the record as a record, it having doubtless been allowed by the register, and being in the appropriate place in the book of records.

It is next insisted, that, as the negroes were left in the possession of Dawson after the mortgage, and were seized and sold to the respondents in October, 1841, to pay a debt due from Dawson to the Commercial Bank of Vicksburg, and as the respondents were innocent purchasers, and without notice of the mortgage, the latter was consequently void. This is the substance of several of the answers. Now, whether a sale or mortgage, without changing the possession of the property, is in most cases only *primâ facie* evidence of fraud, or is *per se* fraud, whether in England or in some of the States, or in Arkansas where this mortgage and the sale took place, may not be fully settled in some of them, though it is clear enough in others. (See cases cited in 2 Kent's Com. 406-412.) So whether a sound distinction may not exist at times between a mortgage and a sale, need not be examined, though it is more customary in all mortgages for the mortgager honestly to retain the possession, than to pass it to the mortgagee. U. States *v.* Hoe, 3 Cranch, 88; Haven *v.* Low, 2 N. Hamp. 15. See 1 Smith's Leading Cases, 48, note; Brooks *v.* Marbury, 11 Wheat. 82, 83; Bank of Georgia *v.* Higginbottom, 9 Pet. 60; Hawkins *v.* Ingolls, 4 Blackf. 35. And in conditional sales, especially on a condition precedent *bonâ fide*, the vendor, it is usually considered, ought not to part with the possession till the condition is fulfilled. See in 9 Johns. 337, 340; 2 Wend. 599. See most of the cases collected in 2 Kent's Com. 406.

But it is unnecessary to decide any of these points here, as, in order to prevent any injury or fraud by the possession not being changed, a record of the mortgage is in most of the States required, and was made here within four or five weeks of the date of the mortgage, whereas the seizure and sale of the negroes to the respondents did not take place till nearly four years after.

Yet it is urged in answer to this, that the statute of Arkan-

sas, making a mortgage, acknowledged and recorded, good, without any change of possession of the articles, did not take effect till March 11th, 1839, over a year after this record.

Such a registry, however, still tended to give publicity and notice of the mortgage, and to prevent as well as repel fraud, and it would, under the statute of frauds in Arkansas, make the sale valid if *bonâ fide* and for a good consideration, unless against subsequent purchasers without notice. Rev. Statutes, ch. 65, § 7, p. 415.

There is no sufficient proof here of actual fraud, or *mala fides*, or want of a full and valuable consideration. And hence the objection is reduced to the mere question of the want of notice in the respondents. In relation to that fact, beside what has already been stated, evidence was offered to show, that the existence of the mortgage was known and talked of in the neighborhood, and proclaimed publicly at the sale.

Indeed, some of the evidence goes so far as to state, that, after the notice of the mortgage at the sale, the sheriff proceeded to sell only the equity of redemption, or to sell the negroes subject to any encumbrances. His own deed says expressly, "hereby conveying all of the right, title, estate, interest, claim, and demand of the said James L. Dawson, of, in, and to the same, not making myself hereby responsible for the title of said slaves, but only conveying, as such sheriff, the title of said James L. Dawson in and to the same."

The proof likewise brings this actual notice home to each of the respondents, before the purchase, independent of the public record of the mortgage and the public declaration forbidding the sale at the time, on the ground that the mortgage existed and was in full force.

According to some cases, this conduct of theirs under such circumstances would seem more fraudulent than any by Merrill. Le Neve *v.* Le Neve, 3 Atk. 646; 1 Stor. Eq. 395; 8 Wheat. 449. Beside this, the answer should have averred the want of notice, not only before the sale, but before the payment of the purchase-money. Till the actual payment the buyer is not injured, and it is voluntary to go on or not when informed that the title is in another. Wormley *v.* Wormley, 8 Wheat. 449; Hardingham *v.* Nicholls, 3 Atk. 304; Jewett *v.* Palmer et al., 7 Johns. Ch. 68. See Le Neve *v.* Le Neve, 3 Atk. 651.

There is another view of this transaction, which, if necessary to revert to, would probably sustain this present mortgage. The Arkansas law to make a mortgage valid if recorded, passed February 20th, 1838 (Rev. Stat. p. 580). This mortgage was on record then, and since, and had been from December, 1837, thus covering both the time when the law took effect

and when the respondents purchased. It was also acknowledged then, and though not before a magistrate in Arkansas, yet before one in Mississippi; and in most States, the acknowledgment may be before a magistrate out of the State as well as in, if he is authorized to take acknowledgments of such instruments.

Nothing appears in the record here against his power to do this. Some complaint is next made of the delay by Merrill to enforce his mortgage against Dawson.

But it will be seen on examining the evidence, that he was not compelled to pay Dawson's notes to the bank till March 4th, 1842, and that these negroes were sold to the respondents and removed some months before, viz. October 11th, 1841, so that no delay whatever occurred on his part to mislead the respondents.

It was next objected, that two or three children, born since the mortgage, should not be accounted for, and one woman, who is supposed to have died after the sale and before this bill in chancery.

But it seems to accord with principle, that the increase or offspring should belong to the owner of the mother (2 Bl. Com. 404; Backhouse's Admr. v. Jetts's Admr., 1 Brock. C. C. 511); and the evidence is so uncertain whether the death of Eliza occurred after this bill or before, that the doubt must operate against the respondents, whose duty it was to prove satisfactorily that it happened before, in order to be exonerated.

It is argued further against the decree, that the respondents were made to account below for a boy, not proved clearly to have been born of one of the mortgaged women. But there seem circumstances in the case from which it might be inferred that he was so born. He was brought up among them, he was under the care chiefly of one, and no other person is shown to have been his parent.

We do not see enough, therefore, to justify us in differing from the judge below on this point.

The rules adopted in the Circuit Court for fixing the value to be paid for the negroes are also objected to, but seem to us proper. 1 Brock. C. C. 500.

The mortgaged property is given up or taken possession of by the mortgagee usually at the time of the decree; and if not surrendered then, its value at that time, instead of the specific property mortgaged, must be and was regarded as the rule of damages.

The injury is in not giving it up when called for then, or in not then paying the mortgage, and not in receiving it some years before, and not paying its value at that time.

This is not trover or trespass for the taking of it originally, but a bill in chancery to foreclose the redemption of it by a decree, and hence its value at the time of the decree is the test of what the mortgagee loses, if the property is not then surrendered.

There is another exception to the estimate made of the value of the hire of the slaves. Their hire or use was charged only from the institution of this bill in chancery. This surely does not go back too far. 1 Brock. C. C. 515.

And some analogies would carry it back further, and in a case like this charge it from the period of their going into the possession of the respondents. But they object to the hire allowed; because, it is said, that clothing, medicine, &c., during this time should have been deducted. 1 Dana, 286; 3 J. J. Marshall, 109.

We entertain no doubt, however, that in fact the hire here was estimated as the net rather than gross hire, and all proper deduction made. It is only a hundred dollars in one case, and seventy in others, which manifestly might not equal their gross earnings, while nothing is charged for the children. Testimony, too, was put in as to the proper amount for hire, and the judge as well as witnesses belonging to the country, and being acquainted with its usages, doubtless made all suitable deductions.

There is no evidence whatever to the contrary.

And on the whole case, we think the judgment below should be affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Arkansas, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

JESSE B. CLEMENTS, PLAINTIFF IN ERROR, v. DANIEL BERRY.

Where the marshal of the United States had levied an execution upon certain property under a judgment in the Circuit Court, which was taken out of his custody by a writ of replevin issued by a State court, and the Supreme Court of the State decided adversely to the claim of the marshal, it is within the jurisdiction of this court to review that decision.

It is the uniform practice of the federal and State courts in Tennessee to test executions as on the first day of the term; and as between creditors, the lien attaches equally to all the judgments entered at the same term.

Where a judgment by default, in an action upon a promissory note, was entered upon the 8th day of the month, but not fully entered up as to the amount due until the 10th, and upon the 10th, a few minutes before the court opened, the debtor recorded a deed of trust conveying away all his property, this deed cannot defeat the lien of the judgment.

The judgment by default created the lien; it was a mere clerical duty to calculate and enter up the amount due.

To note the precise time when deeds are left for record is attended with no difficulty as between deeds; but to settle the exact comparative creation of a lien between a recorded deed and a judgment by a court is attended with much embarrassment. The timepiece of the register cannot settle the validity or invalidity of a judgment lien.

The process act of 1828, passed by Congress, refers to State laws for the creation and effect of liens; but the preparatory steps by which they are created depend upon the rules adopted by the United States courts.

THIS case was brought up from the Supreme Court of Tennessee, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

Clements, the plaintiff in error, was the marshal of the United States District of Middle Tennessee.

The action was a replevin brought by Berry against Clements, in the Circuit Court of Davidson County, Tennessee (State court), and upon the trial in that court the following statement of facts was agreed upon.

DANIEL BERRY *v.* J. B. CLEMENTS.

Replevin. — Circuit Court, Davidson County.

In this case the defendant comes and defends the wrong and injury, when, &c., and says he is not guilty in manner and form as the plaintiff in declaration hath alleged, and of this he puts himself on the country, and the plaintiff also; and the following facts are agreed upon between the parties: — On the 20th of January, 1848, William H. Inskeep, Albert Moulton, Edward D. Woodruff, and John Sibley, citizens of the State of Pennsylvania, trading in partnership under the firm Inskeep, Moulton, & Woodruff, brought an action of debt against Charles F. Berry, a citizen of the State of Tennessee, and resident of Nashville, in the Circuit Court of the United States for the District of Middle Tennessee, upon several notes of

hand executed by said Berry, payable to said Inskeep, Moulton, & Woodruff; the writ and copy of the declaration was served by the marshal upon the said Charles F. Berry on the 20th of January, 1848. The writ was returned to the court with the declaration at March term, 1848, and the following entries were made on the rule docket, and minutes, as by the copy hereunto annexed, and made part of the case agreed, marked A: Inskeep, Moulton, & Woodruff, debt, 20th January, 1848, executed and delivered defendant a copy of declaration. Declaration filed March 1st, 1848; ruled for plea by 8th March; no plea being filed by attorney, takes judgment by default. Circuit Court of United States, Middle Tennessee District. Thursday, March 9th, 1848, court adjourned until to-morrow morning, 10 o'clock. Friday, March 10th, 1848, court met according to adjournment. William H. Inskeep, Albert Moulton, Edward W. Woodruff, and John Sibley, trading under the firm of Inskeep, Moulton, & Woodruff, *v.* Charles F. Berry. The plaintiffs appear by their attorney, and a judgment by default having been taken in this cause on the 8th of March, 1848, and no motion having been made to have the same set aside, it is therefore considered by the court that said judgment by default be affirmed, and that the plaintiffs recover against said defendant $ 1,316.68, their balance of debt in the declaration mentioned, and the further sum of $ 44.22, their damage sustained by reason of the detention thereof, and their cost in this behalf expended, and that execution issue. Session of court commenced on the 6th March, 1848. A true copy. J. McGavock, clerk, by G. M. Fogg, deputy. Berry's deed received at register's office 51 minutes after 9, on the 10th March. Inskeep & Co. Judgment obtained about half-past ten o'clock same day.

The said Circuit Court of the United States commenced its session on Monday, the 6th day of March, 1848. On the 10th day of March, 1848, Charles F. Berry, the debtor, executed a deed of trust to the plaintiff in this cause, a copy of which is hereunto annexed, and made a part of this case agreed:

"Know all men by these presents, that I, Charles F. Berry, of the county of Davidson, and State of Tennessee, of the one part, and Daniel Berry, of the county and State aforesaid, of the other part, witnesseth, that I, the said Charles F. Berry, for and in consideration of the sum of $ 5, to me in hand paid by the said Daniel Berry, and the other consideration hereinafter mentioned, hath this day bargained, sold, transferred, and conveyed, and do by these presents bargain, sell, transfer, and convey, to the said Daniel Berry all my stock of dry goods of every description, and all sorts of ware now in

the storehouse occupied by me on the public square in Nashville, and also in a storeroom occupied by me in Nashville, amounting together to the sum of about $ 12,000, as per invoice book made out this day; three horses, one negro man slave, named Abraham, one buggy, all my accounts of every description, and the book containing the same; all the notes, &c., that are due me, and also my interest, whatever it may be, in the unsettled business of the firm of A. D. & C. F. Berry; also, all the interest I have in and to the following-described lots or pieces of ground, viz. lots No. 5 and 6, as described in a plat made by C. W. Nance, of lots adjacent to the town of Nashville, on Cherry Street, fronting thirty feet each on Cherry, and also lots A and B, in No. 20, in the plan of South Nashville, and lots No. 3 and 4 adjoining F. B. Fogg's lot on Cherry Street. To have and to hold said property, of every description, to the said Daniel Berry, his heirs and representatives for ever. I, the said Charles F. Berry, bind myself, my heirs and representatives, to warrant and defend the title to the same, or any part thereof, to the said Daniel Berry, his heirs and assigns, against the lawful claims of all persons whomsoever. But this deed is made for the following use and trust, and for no other purpose; that is to say, that the said Daniel Berry and A. D. Berry are my accommodation indorsers on the notes, most of them, embraced in schedule A, and whereas I am anxious to secure them, and also the payment of all the claims therein specified, to the persons to whom said claims are due, and also to secure the claims specified in the schedule B to the person therein named, which schedules are to be registered with this deed. Now, if I, the said Charles F. Berry, shall well and truly pay off and satisfy said debts mentioned in schedules A and B on or before the 1st day of December, 1849, then this deed to be void; but if I shall fail to do so, then the said Daniel Berry shall sell whatever remains of said property upon such terms as will be most for the interest of the creditors, and apply the proceeds to the payment, first, of the debts mentioned in schedule A, until they are all paid and satisfied; and, secondly, to the payment of the debts mentioned in schedule B, if there shall be enough after paying the expenses of executing this trust; if not, to make a *pro rata* distribution of the proceeds amongst them. In order to make it more certain that said debts shall be paid within the time specified, I hereby authorize the said Daniel Berry, as trustee, to take immediate possession of all the above-described property, and that he may proceed to sell the same upon such terms as will make it yield the most money; and that he take possession of all my books of accounts, notes, &c.,

and proceed to collect the debts due me as speedily as he can, and to apply the proceeds of the goods and property, and the money collected by him, to the payment of the debts in the order above specified; but that he shall not be forced to make a general sale of said property, goods, &c., until the expiration of said time.

"In testimony whereof, I, the said Charles F. Berry, have hereunto set my hand and seal, this the 10th day of March, 1848.

"C. F. BERRY."

"*State of Tennessee, Davidson County.*

"Personally appeared before me, Robert B. Castleman, clerk of the County Court of said county, the within-named C. F. Berry, the bargainer, with whom I am personally acquainted, and who acknowledges that he executed the within deed of trust for the purposes therein contained.

"Witness my hand at office, this 10th day of March, 1848.

"R. B. CASTLEMAN."

"*State of Tennessee, Davidson County.*

"*Register's Office, March* 11, 1848.

"I, William James, register of said county, do hereby certify that the foregoing deed of trust and certificate are duly registered in my office, Book No. 10, pages 574, 575, and that they were received March the 10th, 1848, 9½ o'clock, A. M., and entered in Note Book 2, page 20.

"WILLIAM JAMES."

And the same was lodged for registration in the register's office, at the time mentioned in the memorandum upon said deed, on the 20th of March, 1848; an execution, being a writ of *fieri facias*, issued upon said judgment, and came to the hands of the marshal on the 21st of March, and by him, on the 24th of March, was levied upon the goods, wares, and merchandise particularly specified in the levy, a copy of which is hereunto annexed, marked C, together with the return of the marshal.

"The President of the United States to the Marshal of the Middle District of Tennessee, greeting:

"You are hereby commanded, that of the goods and chattels, lands and tenements, of Charles F. Berry, in your district, you cause to be made $1,379.85, which William H. Inskeep, Albert Moulton, Edward W. Woodruff, and John Sibley, trading under the firm of Inskeep, Moulton, & Woodruff, in the Circuit Court of the United States for the Eighth Circuit, in the Middle

District of Tennessee, recovered against him for balance of debt, damages, and cost, in a certain action of debt in the said court, lately determined, wherein the said Inskeep, Moulton, & Woodruff were plaintiffs, and said Charles F. Berry was defendant, whereof said defendant is convicted, as appears of record, and have the said money ready to render before the judge of our said court at Nashville, on the first Monday in September next; herein fail not, and have then and there this writ.

"Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this first Monday in March, A. D. 1848, and in the seventy-second year of our independence. JACOB MCGAVOCK, *Clerk.*"

"Issued March 20th, 1848; came to hand 21st March, 1848; levied this *fieri facias* upon the following goods, wares, and merchandise, as the property of Charles F. Berry, this 24th day of March, 1848. Then follows a long list of goods of several pages, specifying each article, item by item, amounting in all to the sum of $2,549.11; the prices annexed to the foregoing list of goods were the invoice prices as furnished by the defendant, but the defendant and myself not agreeing as to the present value of the goods, we called in the following persons, merchants of Nashville, to wit, John B. Johnston, C. Connor, B. F. Shields, and A. J. Duncan, who valued the goods to be worth $1,402, or 55 cents in the dollar upon the invoice prices. J. B. CLEMENTS,

Marshal of the U. S. District of Middle Tennessee."

"The sale of said goods, wares, and merchandise was stopped by a writ of replevin from the Circuit Court of Davidson County, sued out at the instance of Daniel Berry, against me, as marshal; which writ was executed upon me by the sheriff of Davidson County, on the 4th day of April, 1848, and the goods delivered up to said Daniel Berry, by the advice and consent of the plaintiff's attorneys. September 4, 1848.

"J. B. CLEMENTS, *M. M. D. T.*

"A true copy. J. MCGAVOCK, *Clerk.*"

Marshal's fees, commissions on the amount of this execution, by G. M. Fogg, deputy, say on $1,360.90, at 2½ per cent.	$34.02
Serving this *fieri facias*, ...	2.00
	$36.02

These goods were in the store of Charles F. Berry, and had

not been removed therefrom, but Daniel Berry, the trustee, was at the store at the time of the levy, and stated that the said Charles F. was his agent, and the trustee claimed the goods as included in the deed of trust; the goods levied upon were taken possession of by the marshal, and after the writ of replevin was served, they were delivered up by the marshal to Daniel Berry; the goods, wares, and merchandise levied upon were, before the execution of the deed of trust aforesaid, the property of Charles F. Berry. If, upon the above facts, the law is with the plaintiff, then judgment is to be rendered for him, with costs; if for the defendant, the marshal, then judgment is to be rendered for him against the plaintiff and his security, for the amount of the judgment in the federal court; interest and cost as taxed by the federal court.

F. B. Fogg, *for Defendant.*

Ewing & Whitworth, *Attorneys for Plaintiffs.*

Upon this agreed state of facts, the Circuit Court of Davidson County were of opinion that the law was with Clements, the defendant, and gave judgment accordingly. Berry carried the case to the Supreme Court of Errors and Appeals of Tennessee, where the judgment of the Circuit Court was reversed. Clements sued out a writ of error under the twenty-fifth section of the Judiciary Act, and brought the case up to this court.

It was argued by *Mr. Fogg*, for the plaintiff in error, and *Mr. Andrew Ewing*, for the defendant in error.

Mr. Fogg, for plaintiff in error.

The act of Congress of 8th May, 1792, requires all writs and processes, &c. to bear teste of the Chief Justice of the Supreme Court, and the uniform practice in the State and Federal courts in Tennessee is to teste the executions as of the first day of the term from which the execution issues. Executions are liens on personal property, and relate to their teste. When a judgment awards an execution, what does it award? A process that bears teste from the first day of the court. In Johnson *v.* Ball, 1 Yerger, 291, it was decided, and is the settled law of Tennessee, that the statute 29 Charles II. § 3, providing that the personal property of a debtor should only be bound from the delivery of the execution to the sheriff, is not in force in Tennessee, but that it bound as at common law. Preston *v.* Surgoine, Peck, 80. It is true that in the case of Murfree's Heirs *v.* Carmack, 4 Yerger, 270, it was decided that, where a mortgage deed for land was registered on the same day judgment was obtained, and no proof was given as to

the precise time of the judgment. The mortgage would take preference of the judgment, the judgment being only a lien from the day it is there; but in the same term of the court, in the same year, the same court decided, in the case of Foster v. Earnhart, that judgments rendered upon different days of the same term relate to the first day of the term as between creditors, although the records may show the day upon which each was rendered. Can the statute requiring the minutes of the court to be read every day, and to be signed by the judge, be amended for any other purpose than to prevent error and mistake, and can such statutes have any effect upon the lien of executions and judgments in the federal court? The same reason applies to prevent the debtor from giving a preference by deeds of trust to some creditors, as would apply among creditors themselves. The debtor knew a judgment by default had been rendered against him on the 8th of March; that it would be available if he did not set it aside; and he came to give a preference by deed on the 14th of March. Is it right, justice to third persons, the creditors provided for in that deed, to say, that the judgment and execution would overreach that deed?

In the case of Parley v. Lea, 4 Devereux and Battle's Law Reports, p. 169, the Supreme Court of North Carolina decided, that judgments of a court of record, on whatever day of the term they may be rendered, in law relate to, and are considered judgments of, the first day of the term, so that an execution tested on the first Monday of a court, being the 8th of May, 1833, upon a judgment rendered on the 12th of May, 1833, would overreach a deed of trust executed and registered on the 9th of May, 1833. Judge Gaston in his opinion says, that this legal relation of a judgment to the first day of the judicial term is as perfect as was at common law the relation of an act of Parliament to the first day of the legislative session. The law of relation applicable to judgments has been in part changed in that country by the statute of 29th Charles II.; but in this State (North Carolina), and also in Tennessee, it remains as it was at common law. He also says, that in England the statute 29 Charles II. has provided that, against purchasers, no writ of execution shall bind the goods, but from the time such writ was delivered to the sheriff. There being no such statute in North Carolina or Tennessee, the writ of execution binds against all persons from the teste, as it yet does in England, where purchasers are not concerned. The teste of our writ of *fieri facias*, being from the first Monday in March, 1848, the execution overreached the deed of trust. In Coutts *v.* Walker, 2 Leigh, 268, the Court of Appeals of Virginia decid-

ed that a judgment rendered on the 2d of March, 1821, the term commencing the 21st of February preceding, overreached a deed of trust executed on the 28th of February, and registered the 2d of March. See 4 Comyn's Digest, *Execution*, D. 1, and authorities there cited. In Wynne *v.* Wynnes, 1 Wilson, 39, the reason of the rule is stated: "The general intendment of the law is, that every judgment has relation to the first day of the term, because the court cannot determine every suitor's case in one day." Another reason, as stated by the judge in 2 Leigh, may have been to prevent debtors from withdrawing their property from the effects of judgments against them, by alienations made after it was known that, in the course of a term, a judgment would pass.

The practice of the Circuit Courts in Tennessee is regulated by rules which have been in force for a long period. The rule applicable to the suit upon which the execution in this case was founded provides, "that, if the pleadings are not filed by the defendant on or before the first day of the term, the court may on that day fix the time when the pleadings are to be closed, and judgments entered." The day fixed for closing the pleadings was the 8th of March, and judgment by default was then entered, and the only thing remaining to be done was to draw that judgment out formally by the clerk, and calculate the interest, which was not done, owing to a press of business by the clerk, until the 10th of March, the day of the execution of the deed of trust. It is believed that the judgment by default on the 8th of March was not, in the words of the Supreme Court of Tennessee, "wholly inoperative." It might have been so, had it not been affirmed on the 10th of March, during the same term; but the entry of the last date refers to the judgment of the 8th, is founded upon it, adopts and affirms it. It is true, if no judgment had been entered during the same term, and the cause had been continued, and the final judgment had been entered at a subsequent term, there would have been no relation to the preceding term, and the execution would then have been tested on the first day of the term, when the final judgment was entered.

All the cases decided upon the subject of the lien of executions in Tennessee, except two, are collected in Meigs's Digest, title *Execution*, 959. Those two are the present case, and that of the Union Bank *v.* McClung, which will be reported in 9 Humphreys, p. 91, and is upon the relation of an alias execution. The English doctrine is in 2 Tidd's Practice, 998, where he says the *fieri facias* must be tested in term time, and made returnable in term time. By the law of Tennessee, and the practice of the federal courts from their first establishment, all execu-

tions bear teste from the first Monday of the term from which they purport to have been issued, and are made returnable to the first Monday of the succeeding term. There is no difference in the form of the process from the State and federal courts, except that the former are tested by the clerks, and the latter, by the act of Congress of the 8th of May, 1792, bear teste of the Chief Justice of the Supreme Court of the United States.

The plaintiff in error submits that the execution in the cause which came to his hands, authorized him to levy upon chattels belonging to the defendant on the 6th day of March, 1848, the first day of the term, or at all events upon the personal property that he owned on the 8th of March, when the judgment by default was obtained.

Mr. Andrew Ewing, for defendant in error.

There are two questions presented for consideration in this court:—

1st. Whether the court has jurisdiction of the cause?

2d. Which had the prior lien, the execution or the deed?

The defendant in the State court was the marshal, and acting under the authority of the Circuit Court of the United States in levying the execution; but this suit does not dispute his authority or deny his right to its proper exercise; he is sued as a trespasser, for going beyond even the claimed limits of his legal power. If the property levied upon belonged rightly to Daniel Berry, then he was improperly exercising his power, and this was a question of law and fact equally competent for decision in the federal or State tribunals. If the facts of the case proved that any question was raised in the State court in regard to the validity of the judgment or execution under which the marshal acted, or the legal authority of the marshal to levy on the property of the defendant in the execution, then the jurisdiction would have been clear in a decision against their validity; but here the only question decided by the State court was the title of the property levied upon. The defendant in error had no forum for the ascertainment of his rights but the State tribunal, and as he did not question the validity of the judgment or general authority of the marshal, the case does not come within the spirit or the letter of the Judiciary Act of 1789.

2d. The question as to the priority of the liens is, under the process act of 1828, entirely dependent upon what may be the law of Tennessee on this subject, and was therefore a peculiarly fit subject for decision in the State court. It has long been held in Tennessee, that the statute of 29 Charles II., in regard to the lien of judgments and executions, is not in force in that State; the lien of an execution remains, therefore, as at com-

mon law, subject, however, to the statutory modifications of that lien. We find it generally stated, in the earlier common law authorities, that the lien of an execution commenced from its teste, and, as the whole term was regarded as one day, the execution was tested of the first day. The general rule of law, however, was, that fictions which were intended for the attainment of justice never should extend to work an injury. See 3 Bl. Com. 43. Whenever, therefore, a fiction would work injustice, because of its inconsistency with the truth, courts of law ought to look to the real facts. See 3 Bl. Com. 317; 2 Burr. 962. In accordance with this rule of law, it had repeatedly been decided in England that anterior to the statute of 29 Charles II. the lien of an execution only commenced, as against *bonâ fide* purchasers from the debtor, from the true date of the award of the execution. See 8 Coke, 171; Cro. Eliz. 174; 2 Showers, 480; Bingham on Executions, 190. These authorities have been recognized in Tennessee. See 1 Yerg. 292; 7 Yerg. 529. The awarding of an execution in England is a judicial act, and the forms of all of our judgments in Tennessee award an execution in pursuance of the English practice; until the rendition of the judgment the issuance of an execution would be a void act, and would have no foundation on which to rest. The lien of a judgment in Tennessee has been confined by statute to the date of its rendition. See Nich. & Car. 419. It would be singular, therefore, to hold that the execution (which is the incident) had a superior lien to the judgment, which is the principal. In accordanee with this view, the Supreme Court of Tennessee say, in this very case: "Under our practice, the proceedings of the term are, contrary to the practice of the common law, separated and distinguished by the division of days; the record shows the day on which the judgment is rendered, and the date thereof is indorsed upon the execution; to the end, perhaps, that the officer, charged with the execution of the process, might be enabled more easily to discriminate between such alienations of property as were valid, and those which were void as against the judgment and execution. Inasmuch, therefore, as under our law the precise day on which judgment is rendered is fixed and ascertained by the record, it necessarily follows, upon common law principles, that it cannot relate beyond that day as against *bonâ fide* purchasers for valuable consideration; nor can the execution issued thereon, if tested of the same term as the judgment, as against such purchaser, relate beyond the date of the judgment; and as the hour of meeting of the court on each day of the term, under our practice, is also ascertained by the record, the relation of the judgment or execution cannot extend beyond that hour."

This investigation into the fraction of a day, for the ascertainment of truth, where there is record evidence to be obtained, is amply supported by the authorities. See 2 Stark. 787; 7 Com. Dig. 398; 2 B. & A. 556.

Mr. Justice McLEAN delivered the opinion of the court.

This case is brought here by a writ of error to the Supreme Court of the State of Tennessee, under the twenty-fifth section of the Judiciary Act.

The jurisdiction of this court is the first question to be considered. The plaintiff sets up a lien on certain personal property, under a judgment rendered by the Circuit Court of the United States, held for the Middle District of Tennessee. The defendant asserts a lien under a deed of trust for the property, from Charles F. Berry, and the Supreme Court of Tennessee held that the lien of the deed was paramount to that of the judgment. This brings the case within the twenty-fifth section, as the decision was against the right asserted by Clements, under the authority of the United States.

The judgment was obtained by the firm of Inskeep, Moulton, & Woodruff, at March term, 1848, for $1,316.68, against Charles F. Berry. The declaration was filed on the 1st of March; rule for plea by the 8th of March; no plea being filed within the rule, a judgment was entered by default. On the 10th of March "the plaintiffs appear by their attorney, and a judgment by default having been taken in this cause on the 8th of March, 1848, and no motion having been made to have the same set aside, it is therefore considered by the court that said judgment by default be affirmed," &c.

The deed of trust was received at the register's office fifty-one minutes after nine, A. M., on the 10th of March, the same day the deed bears date. The court, it seems, was opened on the 10th, at ten o'clock, A. M.; so that the deed was deposited with the register nine minutes before the court opened on that day. The register, by law, is required to enter on a record the exact time that an instrument is filed for record, and the lien attaches from such entry.

Execution was issued on the judgment, tested the first Monday of March, the day at which the term commenced. It was levied upon part of the goods assigned in the deed of trust, and those goods were replevied by Daniel Berry, the trustee, from Clements the marshal.

It is the uniform practice of the federal and State courts of Tennessee, to test executions as on the first day of the term; and the lien is held equally to attach to all the judgments, as regards creditors, entered at the same term. This rule would

not apply, perhaps, to a *bonâ fide* purchaser of real estate for a valuable consideration, beyond the day on which the judgment was rendered. It is admitted that the statute of 29 Charles II., as to the liens of judgments and executions, is not in force in Tennessee; and that the lien is regulated by the common law, modified, to some extent, by statutes. As against a *bonâ fide* purchaser of personal property, the lien would not attach prior to the award of execution. But the trustee in this case cannot be considered a purchaser, as the assignment was made to him, not on a purchase for a valuable consideration, but for the benefit of certain creditors.

It would present a singular anomaly in judicial proceedings, if the fruits of a judgment could be defeated by a transfer of all the property of the defendant, on the day of its rendition; and with the express view of avoiding the claim of the plaintiff in the judgment, by giving a preference to other creditors. That such an assignment would be fraudulent, as tending to delay and defeat creditors, is clear, but no such defence was made in the State court.

The decision must turn upon the effect of the entries made on the minutes of the Circuit Court. The term of the court commenced on the 6th of March. The declaration was filed on the 1st of March, and a rule for plea was taken in court by the 8th. The rule of court provides, that if the pleadings are not filed by the defendant on or before the first day of the term, the court may on that day fix the time when the pleadings are to be closed and judgment entered.

The plea not being filed within the rule, a judgment by default was entered. Now a judgment by default is interlocutory or final. When the action sounds in damages, as covenant, trover, trespass, &c., it is only interlocutory, that the plaintiff ought to recover his damages, leaving the amount of them to be afterwards ascertained. 1 Tidd's Pr. 568. But where the amount of the judgment is entered by the calculation of the clerk, no further steps being necessary, by a jury or otherwise, to ascertain the amount, the judgment is final. And of this character was the judgment entered on the 8th of March. The action was debt, brought upon several notes of hand; the default admitted the execution of the notes, and the judgment which followed was final, leaving the clerk to make it up in form. The affirmance of this judgment on the 10th of March was unnecessary, as the judgment of the court on the 8th concluded the matter in controversy. It was a mere clerical duty to make the calculation and enter the judgment in form; and the entry on the 10th can be considered, in regard to the lien in question, in effect as nothing more than

the performance of this clerical duty, which had been authorized by the entry on the 8th. It was an affirmance of that which already had been fixed, by the judgment of the court. What remained to be done was matter of form, as it added nothing to the legal effect of the judgment by default. Had the defendant been called and a default entered against him, the case would have stood for judgment at a future call of the docket. But under the rule of the court, "the pleadings were to be closed on the 8th and judgment entered." The defendant failed to plead, and a judgment by default consequently followed. The action being debt, founded upon notes of hand, which were admitted to be genuine by the default, the court saw that no inquiry was necessary, and the judgment was therefore directed to be entered. That judgment was final according to the forms of entering judgments at the common law. The omission by the clerk to make the calculation of the amount of the judgment, and enter it in form, on the 8th of March, was supplied by the entry on the 10th. Such entry, therefore, we think, may be considered as having relation to the first judgment.

It is said to be a legal absurdity to suppose that the lien of the execution can attach prior to the judgment. An execution can be of no validity which has not a judgment to support it. But the judgments entered on the last day of the term, by the law of Tennessee, have relation to the first day of the term, so as to place all the judgments entered at the term on an equality in regard to liens. This it is said is proper to do equal justice to creditors, whose judgments were necessarily entered on different days of the term, from the arrangement of the causes on the docket. But it is said, that a *bonâ fide* purchaser for a valuable consideration would limit the lien of the judgment and execution to the time the judgment was rendered. If this be so, it is not perceived how the principle can be applied to the case before us, unless the defendant in error be considered a *bonâ fide* purchaser. He cannot place himself in that attitude. He holds the property in trust for the creditors named, having paid at the time no consideration for it; and having, as may be presumed from the circumstances, a knowledge that the assignment was made to avoid the effect of the judgment against the assignor. It would be difficult to maintain that this was a *bonâ fide* transaction, and especially that it was entitled to the favorable consideration of the court. In no sense can it be considered a *bonâ fide* sale for a valuable consideration. The trustee is made the agent to pay the creditors named, and he represents their interests as creditors. But if the property had been sold *bonâ fide*, from the effect of the

judgment by default, and the relation to it of the formal judgment of affirmance subsequently entered, the lien would attach from the judgment on the 8th.

We admit that the lien of the judgment and execution in the federal courts arises under the State laws; and that the lien may be considered as a rule of property, and a rule of decision under the thirty-fourth section of the Judiciary Act of 1789. But the preparatory steps, by which the judgment is obtained and the lien established, depend upon the practice of the court; and that practice is settled by the federal courts, and not by the courts of the State. The process act of 1828 "adopted the forms of mesne process, except the style and forms and modes of proceeding in suits in the courts of the United States held in those States, &c., subject, however, to such alterations and additions as the said courts of the United States respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme Court shall prescribe."

The entry by the register of the precise time at which all instruments are deposited with him for record, as required by the act of Tennessee, is no doubt a very proper regulation. It is salutary in relation to instruments deposited for record on the same day. In such cases the priority of time may be ascertained with certainty; but when the fractions of a day are to be compared, under such entries, to a judgment lien, the propriety of the rule is not so apparent. The case before us would present a point of no small difficulty. From the entry, the trust deed appears to have been deposited for record nine minutes before the court was opened. And this is to render inoperative the lien of the judgment. Now, how is the fact to be ascertained with certainty? Where shall the exact standard of time be found. A variation of nine or ten minutes is not uncommon in chronometers; and the timepiece of the register, it is supposed, could have no exclusive claim to regulate judgment liens. Whether good or bad, it would answer the purpose designed by showing the priorities of instruments left for record. But the test in regard to judgment liens would be uncertain and unsatisfactory. As a rule of property it would seem to be, at least in many cases, impracticable. How can one, five, or ten minutes be ascertained with the requisite certainty, to lay the foundation of a right? It would hardly be contended that the entry of a ministerial officer, though made by authority of law, should limit or defeat a judgment lien in such a case. No other decision of the Supreme Court of Tennessee than the one now before us is applicable to this question. And if the case to be reviewed is to constitute the rule for our decision, as insisted, the power of revision would be useless.

Whilst we follow the construction of a State statute, established by the Supreme Court of the State, care must be taken that our jurisdiction and practice shall not be limited or controlled by the statutes or decisions of the State, beyond the acts of Congress.

The judgment of the State court is reversed, and the cause is remanded to that court for further proceedings in conformity with this opinion.

Mr. Chief Justice TANEY, Mr. Justice CATRON, Mr. Justice DANIEL, and Mr. Justice NELSON dissented.

Mr. Justice CATRON.

By rule of court made when only one term was held in the year for the Districts of Tennessee, the United States Circuit Court adopted a rule requiring a copy of the declaration to be sent out with the writ, in all cases of suits on written agreements for the payment of money, where the plaintiff desires to obtain judgment at the return term. If a copy of this declaration is served with the writ on the defendant thirty days before the court commences, then the defendant is required to plead before the first day of the term; and if he fails to do so, it is the duty of the clerk to enter judgment by default at his office. This fact he reports to the court in all cases. And then such further time is given for making up the pleadings as may be deemed proper by the court itself; thus extending the time usually three days. But at March term, 1848, only two additional days to plead were allowed.

This office judgment has no force in itself, further than to speed the final judgment. It stands over, like other causes, triable on an issue. When it is reached on the docket in due course, a jury inquires of damages; or if the sum be certain, then a regular and binding judgment is entered of record by the court.

An execution is uniformly awarded in terms by the final judgment, and to which the execution on its face refers, by a brief recital.

To this award of execution the *fieri facias* relates, and binds personal property of the defendant.

The United States courts are governed by the State laws creating a lien; and the State laws are settled by uniform adjudications that the lien attaches by a final judgment and award of execution. From that time defendant's property is in custody of the law. Johnson *v.* Ball, 1 Yerger, 292.

In this case there is no allegation of fraud. The debtor transferred his property to a trustee honestly and fairly, accord-

ing to the face of this record. By the law of Tennessee, the deed of trust took effect the moment it was delivered to the register to be recorded. It was his duty by express law to indorse on the deed the exact time of delivery. After that, all liens were cut off. This was done before the judgment was rendered. It matters not whether defendant parted with his property on the day the judgment was rendered, or on a subsequent day, as he was divested of it the moment the trustee delivered the deed to be recorded. If it was otherwise, and the execution related to a judgment by default (which might remain unconfirmed for months), all executions or final judgments, where a default had been entered, would bind from the first day of the term, and overreach sales made by retail dealers to an alarming extent; a doctrine unknown and altogether inadmissible in the State of Tennessee, or elsewhere, so far as I know.

The Supreme Court of Tennessee (to revise whose decision this writ of error is prosecuted) laid down the law correctly, as I think, in its opinion in this cause, and I am of opinion that the judgment ought to be affirmed. And I am instructed to say for my brother Nelson, who heard the cause, but is now absent, that this is his opinion also.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Tennessee, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Supreme Court, for further proceedings to be had therein, in conformity to the opinion of this court.

JOSHUA J. MOORE, PLAINTIFF, v. JAMES BROWN, ALFRED BROWN, HARMON HOGAN, AND JOSEPH FROWARD.

According to the statute of limitations passed by the State of Illinois, a defendant in ejectment who had been in possession of the land by actual residence thereon, having a connected title in law or equity deducible of record from the State or the United States, or from any public officer or other person authorized by the laws of the State to sell such land for the non-payment of taxes, &c., might defend himself by pleading that he had been in possession as aforesaid for seven years.

But where a defendant offered a deed in evidence, purporting to be a deed from an officer authorized to sell for taxes, and the deed upon its face showed that the officer had not complied with the requisitions of the statute, this was a void deed, made in violation of law, and did not bring the defendant within the benefit of the statute of limitations.

He must have a connected title from some one authorized to sell, and in this case the officer was not so authorized. The deed was not, therefore, admissible in evidence.

THIS case came up from the Circuit Court of the United States for the District of Illinois, upon a certificate of division in opinion between the judges thereof.

The whole case was contained in the certificate, which was as follows:—

"*The United States of America, District of Illinois.*

"At a Circuit Court of the United States, begun and held at Springfield, for the District of Illinois, on Monday, the 7th day of June, in the year of our Lord 1847, and in the seventy-first year of our independence.

"Present, the Hon. John McLean and the Hon. Nathaniel Pope, Esquires.

"JOSHUA J. MOORE *v.* JAMES BROWN, ALFRED BROWN, HARMON HOGAN, and JOSEPH FROWARD.

"*State of the Pleadings.*

"This is an action of ejectment, brought under the statute of the State of Illinois, and plea not guilty of withholding the premises, according to the same statute.

"This cause coming to trial this term, the plaintiff proved title in himself, regularly derived from the United States, and by special agreement the possession of the defendants was admitted.

"The defendants then proposed to prove that they had been possessed of the premises in question by actual residence thereon, having a connected title thereto in law or equity, deducible of record from a public officer of the State of Illinois, authorized by the laws of the State to sell land for the non-payment of taxes, for the term of seven years next preceding

the commencement of this suit; and as the first link of evidence towards making such proof, stating that they would follow it up by other complete proofs, offered in evidence a deed made by the Auditor of Public Accounts of the State of Illinois, which deed is in the words, figures, and seal following, to wit: —

"'The Auditor of Public Accounts of the State of Illinois, to all who shall see these presents, greeting: Know ye, that whereas I did, on the 9th day of December, 1823, at the town of Vandalia, in conformity with all the requisitions of the several acts in such cases made and provided, expose to public sale a certain tract of land, being the south half of section thirty-five, township twelve north, in range one west of the fourth principal meridian, for the sum of $10.81, being the amount of the tax of the years 1821 and 1822, with the interest and costs chargeable on said tract of land. And whereas, at the time and place aforesaid, Stephen Davis offered to pay the aforesaid sum of money for the whole of said tract of land, which was the least quantity bid for; and the said Stephen Davis has paid the sum of $10.81 into the treasury of the State; I have granted, bargained, and sold, and by these presents, as auditor of the aforesaid State, do grant, bargain, and sell, the whole of said south half of section thirty-five, in township twelve north, in range one west of the fourth principal meridian, to Stephen Davis, his heirs and assigns. To have and to hold said tract of land to the said Stephen Davis and his heirs for ever; subject, however, to all the rights of redemption provided for by law.

"'In testimony whereof, the said auditor has hereunto subscribed his name and affixed his seal, this 20th day of June 1832. J. T. B. STAPP, *Auditor.*'

"'*State of Illinois, State Recorder's Office, ss.*

"'I certify that the within deed has been duly recorded in this office, in Vol. F, page 281. Given under my hand and seal of office, at Vandalia, this 31st day of May, A. D. 1833.

'JAMES WHITLOCK, *State Recorder.*

"'Fees 43¾ record.
37½ cert. and seal.
$0.81¼.'

"Which deed includes the premises in question in this suit; to the introduction of which deed the plaintiff objects, on the ground that, by reference to the face of the deed, and the law as it then stood ('An Act entitled An Act for levying and collecting a tax on land and other property,' approved February 18th, 1823), it appeared that the sale for the non-payment of

taxes had been made by the auditor at an earlier day than he could according to law possibly do. And so it occurred as a question whether said deed was admissible in evidence for the purpose and in the connection for and in which the defendants offered it, the objection aforesaid notwithstanding; on which question the opinions of the judges were opposed. Whereupon, on motion that the point on which the disagreement has happened may during the term be stated, under the direction of the judges, and certified under the seal of the court to the Supreme Court, to be finally decided, it is ordered, that the foregoing statement of the case and facts, made under the direction of the judges, be certified according to the request of the plaintiff, and the law in that case made and provided."

It was argued for the plaintiff in a printed argument prepared by *A. Williams*, Esq., who was not an attorney of this court, and therefore the argument was adopted and signed by *Mr. Butterfield*. No counsel appeared for the defendants.

The argument for the plaintiff was as follows: —

This was an action of ejectment brought by the plaintiff, Moore, against the said defendants, in the Circuit Court of the United States for the District of Illinois.

On the trial, at the June term of 1847, the plaintiff proved title to the land sued for in himself, and that the defendants were in possession of the same at the commencement of this suit, and rested his case.

The defendants then, in order to make out a defence under the limitation act of Illinois, passed in 1835, offered in evidence, as the foundation of their title, a deed from the Auditor of Public Accounts for the State of Illinois, which is set out at length in the record. It purports, on its face, to have been executed by virtue of a sale made on the 9th day of December, 1823, for the non-payment of taxes under the revenue act passed February 18, 1823.

Upon the admissibility of this deed as evidence, the judges were opposed in opinion.

The revenue act of 1823 requires the owners of lands to pay the tax thereon into the State treasury on or before the 1st day of October, and the seventh section provides that, if they shall fail, refuse, or neglect to pay the taxes aforesaid, it shall be the duty of the auditor to make a transcript from his books of all such delinquents, charging the tax with an interest at the rate of six per centum per annum, until paid, and all costs which may accrue; and cause the same to be advertised in the paper printed at the seat of government, or in some other

paper printed in the State, for three weeks, giving notice of the day of sale, the last of which publications shall be at least two months before the day of sale, and the auditor shall proceed to sell, on the day fixed in such advertisement, the whole, or so much of each tract as will pay the tax, interest, and costs."

It will be seen from the foregoing, that the auditor could not possibly be authorized to sell before the 15th of December, and as the deed shows that the sale was made on the 9th of December, it is absolutely void, as appears upon its own face. It was therefore clearly inadmissible as evidence of title, and the only question presented for the decision of the court is, whether it was admissible as evidence of "a connected title in law or equity," within the meaning of the limitation act of 1835. The second section of that act is in these words: "Every real, possessory, ancestral, or mixed action, or writ of right brought for the recovery of any lands, tenements, or hereditaments, of which any person may be possessed by actual residence thereon, having a connected title in law or equity, deducible of record from this State or the United States, or from any public officer or other person authorized by the laws of the State to sell such land for the non-payment of taxes, or from any sheriff, marshal, or other person authorized to sell such land on execution, or any order, judgment, or decree of any court of record, shall be brought within seven years next after possession being taken as aforesaid," &c. This act is found on page 349 of the Revised Statutes of 1845, § 8.

It is freely admitted, that the legislature did not intend, by the words "a connected title in law or equity," a perfect and indefeasible title, because such a title would need no legislative protection; but we insist that they never intended to extend this protection to a person in possession under a deed absolutely void upon its own face

That they did not so intend will most manifestly appear from an examination of two other acts on the same subject, still in full force. The first was passed in 1827, and provides, "that every real, possessory, ancestral, or mixed action, or writ of right, brought for the recovery of any lands, tenements, or hereditaments, shall be brought within twenty years next after the right or title thereto, or cause of such action, accrued, and not after." See Revised Statutes of 1845, p. 349, § 7.

Something more than mere naked possession is necessary to constitute a bar under this act. The possession must be adverse, and though it is not easy to determine, in all cases, what is adverse possession, it may be affirmed that it must be a pos-

session held by a person claiming the land in his own right, Bell *v.* Fry, 5 Dana, 344. In Tillinghast's Adams on Ejectment, p. 451, it is laid down as a rule, that, "to constitute a valid and effectual adverse possession, it is necessary that it be commenced under color and claim of title." And at p. 453 it is said: "But no act or deed which is void can be the foundation of an adverse possession, for it can give no color of title." See Den ex dem. Walker *v.* Turner, 9 Wheat. 541.

In Jackson ex dem. Ten Eyck *v.* Frost, 5 Cowen, 350, 351, Savage, Chief Justice, delivering the opinion of the court, says: "I am aware that it was said, in the case of Jackson *v.* Thomas (16 Johns. 301), that if a man enters on land without claim or color of title, and no privity exists between him and the real owner, and such person afterwards acquires what he considers a good title, from that moment his possession becomes adverse. This doctrine must not be understood as authorizing the purchaser to consider a naked possession a good title. It must be, as I understand the law, such a title as the law will, *primâ facie*, consider a good title. Otherwise, there would be no uniformity. The character of the possession might be made to depend upon the understanding of the tenant; and the same possession which would be a good defence to one would be worthless to another, and hence a possession under a French grant was held not to be adverse, because such a grant could not possibly be the source of a good title."

It is said in Dufour *v.* Camfranc, 11 Martin, 715, that a title "void in itself will prevent him in whose favor it was executed from pleading prescription." (See also 1 Martin, N. S. 324; 4 Martin, N. S. 224.) It is doubtful from these authorities, whether the auditor's deed would be even sufficient to constitute adverse possession, and there is certainly no pretext for saying that it amounts to any thing more than color of title, and the legislature clearly intended, by the words "a connected title in law or equity," something more than color of title, as they have provided that a possession held under the one for seven years should be a bar, whilst under the other they require a possession of twenty years to constitute the bar.

But again. On the 2d of March, 1839, the legislature passed an act "to quiet possessions and confirm titles to land," which provided, among other things, that "hereafter every person in the actual possession of lands or tenements, under claim and color of title, made in good faith, and who shall for seven successive years after the passage of this act continue in such possession, and shall also, during said time, pay all taxes legally assessed on such lands or tenements, shall be held and

adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title." (See Session Acts 1838 and 1839, p. 266; also found in Revised Statutes of 1845, p. 104, § 8.)

This act, passed when the two former acts were in force, without attempting to repeal either of them, requires, in addition to seven years' actual possession under "claim and color of title," that the color of title should be made in good faith, and also requires the payment of taxes for seven years; showing clearly that the legislature intended by the act of 1835 something more than claim and color of title. These acts were all reënacted in 1845. (See Revised Statutes of 1845, as above quoted.)

Taken together, they show the legislative intention to be, 1st, that where a person rests his defence upon adverse possession merely, he must show a possession of twenty years; 2d, that where he relies upon a possession held under claim and color of title merely, he must show, in addition to seven years' possession, that the color of title was made in good faith, and also that he had paid the taxes for seven successive years; and 3d, that when he relies on possession under a connected title in law or equity, &c., he must show, in addition to his title, seven years' actual possession, by residence on the land. I repeat, then, that it is evident that the legislature meant by the words "a connected title in law or equity" something more than "claim and color of title made in good faith." What, then, did they mean? They most clearly intended, as Chief Justice Savage expresses it, "such a title as the law will *primâ facie* consider a good title"; or, as expressed by the Supreme Court of Kentucky, "a title which is good when tested by itself."

This is the reasonable construction upon general principles of law, strengthened by the several acts of the legislature on the subject. But there is another view which renders it imperative. The act of 1835 was copied from the Kentucky act of limitation of February 9, 1809. The words, "a connected title in law or equity deducible of record," &c., are copied literally from the Kentucky statute, and of course they were adopted with the construction which they had previously received from the courts of Kentucky. In the case of Skyles's Heirs *v.* King's Heirs, decided by the Supreme Court of Kentucky in 1820 (fifteen years before these words were copied into the Illinois statute), and reported in 2 A. K. Marshall, 387, the court say: "The true construction, then, of the words of the statute, 'a connected title in law or equity deducible from the Commonwealth,' does and must mean such title when tested

by its own face, and not tried by the title of others. If the defendant's title should be a connected title in law or equity, supposing no other to exist on the ground, then if he proves seven years' possession holding under it, the statute shall aid him, although the plaintiff may be able to show, by the production of his own title or that of others, that the title did not in law or fact pass to the defendant."

The deed offered in evidence in this case was not such as the law would *primâ facie* consider good. It is not good when tested by its own face, but it is absolutely void upon its own face. It was contended on the other side, that this deed was not void upon its face, because it only appears to be void when the facts appearing upon its face are compared with the law. In this sense, no deed can be void on its face. Deeds are valid or void according as they are in conformity with or in violation of the law, and they can neither be pronounced valid or void but by applying to them the law. The court is supposed to know and apply the law to the deed, and when, from this knowledge of the law and an inspection of the deed, a court is enabled to pronounce it void, then it is void upon its face; but when its invalidity is shown by evidence *dehors* the deed, then it is not void upon its face. The statute requires "a connected title in law or equity deducible of record from this State, or the United States, or from any public officer or other person authorized by the laws of this State to sell such land for the non-payment of taxes, or from any sheriff or marshal, or other person authorized to sell such land on execution, or under any order, judgment, or decree of any court of record. The title is to be deduced from one of four sources. In this case it is attempted to deduce it from a person authorized by law to sell the land for the non-payment of taxes. If this deduction of title can be made out in this case, through a void deed, it may be so done in each of the other cases. It will hardly be contended that a title could be deduced from the State or the United States through a patent void on its face, or that title could be deduced from a sheriff or marshal through a void deed, or one founded on a void judgment (see Walker *v.* Turner, 9 Wheat. 541); or that a sheriff's deed of the land of A, under a judgment against B, would be such a title as the law requires.

The law requires a connected title. The auditor's deed was one link in the chain of title, and is in no respect distinguishable from the other links in the chain; and if this first link in the chain may be furnished by a void deed, so may each of the other links in the chain. In deducing title from the United States under this statute in the Circuit Courts of the State, a

party is universally required to show a valid patent and chain of valid deeds, duly authenticated, from the patentee to the defendant, and this is the universal sense of the profession in the State. No case involving the construction of the statute has ever been decided by the Supreme Court of Illinois.

The title must be deduced from a person authorized by law to sell such land for the non-payment of taxes. The auditor was not authorized to sell this or any other land at the time when the deed shows the sale to have been made. He had no general authority to sell lands, but only to sell such lands as have been listed with and advertised by him, and then only in the manner prescribed by law. In reference to a deed made under this same act, but where the defect did not, as in this instance, appear on the face of the deed, the Supreme Court of Illinois say: "The publication of notice of sale by the auditor, as required by law, is not one of these facts inferred from his deed, nor is the proof thereof thrown upon the former owner. The duty of the auditor to publish this notice is imperative. His authority to sell is limited, by the express words of the law, to the land advertised as aforesaid, and as the rule of law which required the purchaser to show the performance of this prerequisite was not changed by the act of 1827, he should therefore have adduced evidence to that effect. Without proof of this fact, the auditor's deed was not evidence of the regularity and legality of the sale, and consequently conveyed no title to the purchaser." Garrett *v.* Wiggins, 1 Scam. 337; also Hile *v.* Leonard, 1 Scam. 140; and Wiley *v.* Bean, 1 Gilm. 302.

It may be remarked, that, although the Supreme Court of Illinois have held, in relation to sales under the revenue law of 1829, that the auditor's deed alone was *primâ facie* evidence of title, yet they have never so held in relation to sales under the revenue law of 1823, under which the sale in this case was made, and the decisions above quoted have never been questioned.

The deed, then, was not evidence of a title deducible from a person authorized by law to sell such land, &c. The auditor derived his authority from the law. The law was his warrant or power of attorney to sell the land of another without his consent, and is certainly entitled to no more favorable construction or consideration than a power of attorney voluntarily executed by the owner of the land, authorizing its sale in a certain prescribed mode. Then suppose the auditor to have made this sale under such power of attorney, executed by the owner, authorizing the sale on precisely the terms prescribed by this statute, and the auditor had sold in precisely the same

manner that he did in this case, would any person pretend that his deed would be evidence of title for any purpose whatever?

The legislature intended to extend this protection to persons who occupied land under a connected title, *primâ facie* good, against proof *aliunde* which would rebut or destroy such *primâ facie* title. There is no hardship in requiring a person to know the law, and to take notice of defects appearing upon the face of his own title. There is reason and policy in protecting a person who has a title, good *primâ facie*, against evidence or facts the existence of which he has not the means of knowing. It is, on the other hand, but justice to the owner who is to lose his land by so short a limitation, that the statute should be restricted to persons holding under a title *primâ facie* good. This construction preserves the policy of the law in helping the vigilant and not the careless. It preserves the well-founded distinction between mistakes of law and fact. The law always relieves against the latter, but never against the former. It has the advantage of certainty, whilst the opposite construction would introduce all the mischiefs of uncertainty, without furnishing any landmark for the guidance of courts and parties.

In Louisiana a person may prescribe for land of which he has held the possession under a just title, which is defined by the Civil Code of that State to be "a title which the possessor may have received from any person whom he honestly believed to be the real owner."

Under this law it has been held that, "if the title under which the acquisition is made be null in itself, from defect of form, or discloses facts which show the person from whom it is acquired has no title, it cannot form the basis of this prescription, because the party acquiring must be presumed to know the law, and consequently wants the *animo domini* which is indispensable in cases of this kind; but where the title is free from these defects, and the property is not transferred by want of title in the person making the transfer, then it forms a good ground for the prescription; or, in other words, the inquiry is whether the error be one of fact or of law." Frique *v.* Hopkins et al., 4 Martin, N. S. 224.

The occupying claimant act of Kentucky provides, "that if any person hath peaceably seated or improved, or shall hereafter so seat or improve any lands, supposing them his own by reason of a claim in law or equity, the foundation of such claim being of public record, but which lands shall prove to belong to another, the charge and value of seating and improving shall be paid by the right owner to such seater," &c. 2 Morehead's Stat. 1231. In the construction of this statute, the courts of Kentucky adopt the same distinction between error

of fact and of law, holding that persons who, by a knowledge of the law, might know they had no title, were not within the meaning of the statute. Barlow *v.* Bell, 4 Bibb, 106; Clay *v.* Miller, 4 Bibb, 461; Young *v.* Murray, 3 A. K. Marsh. 58.

Under the Tennessee limitation law, which required seven years' possession under a title founded upon a patent, it was held that a sheriff's deed, founded on a sale under a void judgment, was not a title within the meaning of the law. Walker *v.* Turner, 5 Peters, 668. In this case the advertisement stands in the place of the judgment. In the Tennessee case the judgment and execution gave authority to the sheriff to sell. In Illinois, according to the decision in the case of Garrett *v.* Wiggins, 1 Scam. 335, the advertisement authorized the auditor to sell, and the advertisement in this case, if any was made, being void, his deed was not a title within the meaning of the Illinois limitation law, unless the summary and *ex parte* sales are to be more favored than sales made under judgment and execution, which will scarcely be contended.

In the case of Powell *v.* Harman, 2 Peters, 241, the defendant proved that he had been in peaceable possession of the land for more than seven years, holding adversely to the plaintiff under a deed from the sheriff of Montgomery County, founded upon a sale for taxes, but which sale was admitted to be void because the requisites of the law in regard to the sales of land for taxes had not been complied with.

On the trial it occurred as a question whether a void deed is such a conveyance that a possession under it will be protected by the statute of limitations.

The judges being opposed upon this question, it was referred to the Supreme Court for its opinion. Chief Justice Marshall, in giving the opinion of the court, says: "The question now referred to this court differs from that which was decided in Patten's Lessee *v.* Easton, 1 Wheat. 476, in this, that the defendant, who sets up a possession of seven years in bar of the plaintiff's title, endeavors to connect himself with a grant. The sale and conveyance, however, by which this connection is to be formed, are admitted to be void. The conveyance, being made by a person having no authority to make it, is of no validity, and cannot connect the purchaser with the original grant. We are therefore of the opinion that the law is for the plaintiff."

It will be observed that the Tennessee act did not in express terms, as the Kentucky and Illinois acts do, require a connected title. This was only required by the construction given to the act by the Tennessee courts, and although these courts have since changed that construction, the authority of these cases, as

to the kind of conveyances by which a connected title is to be made, is not thereby in the least impaired.

All these cases, as well those in this court, as the New York, Louisiana, and Kentucky cases, recognize and apply to this and like cases the well-known maxim, *Ignorantia facti excusat; ignorantia juris non excusat.*

Mr. Justice WAYNE delivered the opinion of the court.

Upon the trial of the cause, after the plaintiff had introduced his testimony and rested his case upon it, the defendants, in order to bring themselves within the limitation act of Illinois, passed in 1835, offered in evidence as the foundation of their title a deed from the Auditor of Public Accounts of the State of Illinois. It purports to have been executed by virtue of a sale made on the 9th day of December, 1823, for the non-payment of taxes under the revenue act of February, 1823. The plaintiff's counsel objected to the introduction of the paper, and the court were divided in opinion as to its admissibility.

The act just mentioned requires the owners of lands to pay their taxes into the State treasury, on or before the 1st day of October. The seventh section declares, if they shall fail to do so, "it shall be the duty of the auditor to make a transcript from the books of all such delinquents, charging the tax with an interest at the rate of six per centum until paid, and all costs which may accrue," and that the auditor shall "cause the same to be advertised in the paper printed at the seat of government, or in some other paper printed in the State, for three weeks, giving notice of the day of sale, the last of which publications shall be at least two months before the day of sale, and the auditor shall proceed to sell, on the day fixed in such advertisement, the whole, or so much of each tract as will pay the tax, interest, and costs."

The second section of the act of limitation is as follows:— "Every real, possessory, ancestral, or mixed action, or writ of right, brought for the recovery of any lands, tenements, or hereditaments of which any person may be possessed by actual residence thereon, having a connected title in law or equity deducible of record from this State or the United States, or from any public officer or other person authorized by the laws of the State to sell such land for the non-payment of taxes, or from any sheriff, marshal, or other person authorized to sell such land upon execution, or any order, judgment, or decree of any court of record, shall be brought within seven years next after possession being taken as aforesaid." Rev. Stat. 1845, p. 349.

Upon comparing this section with the acts of 1827 and 1829

upon the same subject, we have concluded that the section of the act of 1835 was not meant to give protection to a person in possession under a deed void upon the face of it. The mode of determining that is to test the deed by making a reference to the authority recited in it for making the sale, in connection with the act giving the auditor the power to sell. When the sale is found not to be according to that power, the deed is void upon its face, because the action of the auditor is illegal, and the law presumes it to be known to a purchaser. The latter can acquire no title under it. Being a void deed, possession taken under it cannot be said to be adverse and under color of title. What was the fact in this case? It is disclosed upon the face of the deed, that the auditor sold the land short of the time prescribed by the act. It was not, then, a sale according to law. That must have been as well known by the purchaser as it was by the auditor. The law presumes it to have been. The act under which the sale was made was not meant to prescribe the authority of the auditor only to make sales, but also to give to purchasers full information of the terms upon which a title could be acquired to lands sold for the non-payment of taxes. It was meant to put bidders at a tax sale upon the inquiry, whether or not the land was offered for sale according to law. If they do not examine, and shall buy land exposed to sale for taxes against the law, they do so at their own risk, and it will be presumed against them that they know that the deeds given under such circumstances are made in violation of official duty and of the law. It cannot be made the foundation of an adverse possession under color of title against the true owner of the land, whose title to it, the law says, can only be divested in a certain way for a failure to pay taxes due upon the land. We do not put the conclusion upon the point exclusively upon the fact that it is a void deed; but that it is so, being a deed made in violation of law. It is such a deed that the defendant proposes to use to let in the proof of a possession which will be protected by the statute of 1835. Upon general principles, such a paper would not be admissible as evidence for any purpose in ejectment, and we think it was not meant to be included as one of those titles of record provided for by the act of 1835. Before the limitation of the act can operate, it must be shown by one claiming its protection, that he has been in actual possession of the land to which it is sought to be applied for seven years before the commencement of the suit, by a connected title in law or equity, deducible of record from the State or the United States, or from any public officer or other person *authorized by law* to sell such land for the non-payment of taxes. Such language

does not apply to the general authority given by law to an officer to sell lands for taxes, but to what his authority is to sell the particular land for taxes which he exposes for sale. The words of the act are, to sell "such land for the non-payment of taxes"; that is, that land which a party claims under the deed, and from his actual residence of seven years upon it. Can it be said, then, when the auditor, as he did in this instance, sells land for non-payment of taxes short of the time that the law authorizes him to sell, that he was an officer authorized to sell such land for the non-payment of taxes? We think not. This interpretation is more in harmony with the title which the act requires before its protection can attach. A title and seven years' actual residence upon the land are necessary. The legislature must have meant by title something more than a void deed upon its face; a title, at least, which would be sufficient to induce the possessor of the land to think, and the law to conclude, that there was a foundation for a possession under a right which had been acquired by a purchase. Not a mere naked possession, but one taken in good faith by a purchaser. The protection intended by the act cannot be better expressed than it is in the able printed argument of the plaintiff's counsel. "The legislature intended to extend its protection to persons who occupied land under a connected title *primâ facie* good, against proof *aliunde* which would rebut or destroy such *primâ facie* title." This conclusion too is supported by the case of Skyles's Heirs *v.* King's Heirs, in 2 A. K. Marshall. The act of 1835 was copied from the Kentucky limitation act of February, 1809, and after the courts of Kentucky had decided that "the true construction of the words of the statute, 'a connected title in law or equity deducible from the Commonwealth,' does and must mean such a title when tested by its own face, and not tried by the title of others. If the defendant's title should be a connected title in law or equity, supposing no other to exist upon the ground, then if he proves seven years' possession holding under it, the statute shall aid him, although the plaintiff may be able to show, by the production of his own title or that of others, that the title did not in fact nor in law pass to the defendant." Illinois having taken the act from Kentucky, it is certainly not unreasonable to suppose that her legislators knew the construction which had been put upon it, and meant the act to give protection according to that construction.

We shall direct the point certified to this court to be answered, that the paper offered in evidence by the defendant is a void deed upon the face of it, and was not admissible as evidence for the purpose for which it was offered.

Mr. Chief Justice TANEY, Mr. Justice CATRON, and Mr. Justice GRIER dissented.

Mr. Chief Justice TANEY.

Upon the statements and admissions contained in this record, the question certified for the decision of this court is a very narrow one; but at the same time one of much nicety and difficulty. It is admitted that the defendants had possessed the land in dispute by actual residence thereon for the term of seven years next preceding the commencement of this suit. And if they had paid the taxes during that time, it is very clear that they were protected by the act of limitations of 1839, and the deed would in that case have been admissible in evidence. For the suit appears to have been instituted in 1848, and more than seven years had then elapsed after the passage of that act. But the case as stated is silent as to the payment of taxes; and it does not appear whether they were or were not paid by the defendants, or by any other person. The rights of the parties, therefore, according to the statement as certified, must be governed by the act of limitations of 1835, and not of 1839.

The act of 1835 is loose and ambiguous in its language, and open to different interpretations. Expounded literally, it might seem to mean that a party who had a valid title on record should be protected in his possession after the lapse of seven years. This certainly was not the meaning of the legislature, because a good title of record needed no protection from a statute of limitations. It is obvious that one of the main objects of the law was to protect the possession of persons who purchased upon the faith of conveyances made by the public officers of the State, who were authorized to sell and convey; but whose deeds, from some mistake or error of judgment on their part, were sometimes not valid, and conveyed no title to the purchaser. The law was made for a new country, where the purchasers of small tracts of land were mostly immigrants, unacquainted with the laws regulating sales and conveyances of real property; and many of them unacquainted even with the language in which the laws were written. Skilful and experienced conveyancers were not to be found in every part of the country, from whom they might take counsel. And they would naturally and fairly rely upon conveyances made by the officers of the State, purporting to be made in the execution of their official duty. It was manifestly the object of the law to protect the possessions of persons of this description, and by that means induce an agricultural population to settle in the State; and its loose and inaccurate language ought to be interpreted

in the same spirit. It gave to the original owner seven years to assert his title. And if he chose for that period of time to acquiesce in the sale, and to suffer the purchaser and those claiming under him to possess and improve the land as their own, he was barred by his laches. And it undoubtedly also intended to prevent persons from prying into titles and searching for legal defects in older possessions, for the purposes of speculation, where the party holding them had honestly bought and paid his money, and the original owner had for seven years acquiesced in the sale.

It is true that the case before us admits that it appears by the recitals in the deed of the auditor that the notice of the sale was not as long as the law required. And it is said that every person is presumed to know the law, and that every one who afterwards purchased under this title must therefore be presumed to have known that this deed was void.

Undoubtedly, as a general principle, every one is chargeable with a knowledge of the law in civil as well as criminal cases. This, however, is a legal presumption which every one knows has no real foundation in fact, and has been adopted because it is necessary as a general rule for the purposes of justice. And laws are therefore often passed to protect persons who have acted in good faith in matters of property from the consequences of their ignorance of law. Thus, laws confirming defective and void deeds for real property have frequently been passed in some of the States; and their validity has been recognized by this court. Limitation laws in regard to suits for real estates are founded upon the same principle. For if the title papers of the party in possession are all legally executed, and made by persons who had the right to convey, he does not need the protection of an act of limitations. The act before us was evidently and especially intended to protect purchasers from the consequences of their ignorance of the law. And with this object in view, it could make no difference whether the legal defect was shown by the recitals in the deed, or appeared in any other way. The buyer would be as easily and naturally misled by his want of legal information in either case. And the law itself certainly draws no distinction between ignorance of the law in one respect and ignorance in another. And if every legal defect in the title papers of a purchaser in possession, as they appear on the record, may be used against him after the lapse of seven years, the law itself is a nullity, and protects nobody.

To a person not well skilled in all the details of the tax laws of the State, this deed upon the face of it appears to be good. It was made by a public officer authorized to sell for taxes.

From his official station and duties, he would be presumed to be familiar with the tax laws in all their minute details. And he recites what he had done; states the notice given, as if it was the notice the law required; and professes to convey to the purchaser a valid title in due form. Almost every one, not perfectly acquainted with the different tax laws which had been passed, would rely upon it. And I think it is one of those defective conveyances by a public officer, which the law of 1835 intended to protect after a possession of seven years.

It is said in the argument, and a judicial decision is quoted to support it, that the limitation is confined to cases where the title upon the record appears to be a valid legal title until a better one is produced. If that be the construction of the law, it protects the purchaser where, by the mistake of the officer, land has been sold upon which no taxes were due, provided the deed upon the face of it appears to be valid, and refuses to protect him where the taxes were actually due and the land liable, provided an error in the proceedings appears in the recitals in the deed. In other words, it bars the recovery of the innocent owner whose land has been wrongfully sold, and protects the defaulter. Such could hardly have been the intention of the legislature. And in my opinion the language of the law does not justify this construction. Indeed, if it be as contended for in the argument, then a mere oversight in reciting the dates of the notice or date of the sale deprives the purchaser and those claiming under him of the protection of this law, although the taxes were due, and the sale regularly and fairly made. For the error will appear in the recorded instrument, and consequently it is not a good and valid title on record. And this may have been the case in the deed before us.

The consideration paid at the tax sale is indeed so small, as to create doubts of the fairness of the transaction. But that question is not open in this court upon the point certified. The statement in the record does not impute bad faith to either of the parties to this sale, and moreover the present defendants were not the original purchasers. For aught that appears in the statement, they purchased for a full consideration, and without any actual knowledge or suspicion of a defect in the title, and have therefore strong equitable considerations to support them in claiming the protection of this statute of limitations.

I am sensible, however, as I have already said, that the construction of this statute is by no means free from difficulty. But as I do not concur in the interpretation given to it by a majority of my brethren, and the decision of the question certified may affect wider interests than those immediately

involved in this suit, I have felt it my duty to state the grounds on which I dissent.

Mr. Justice CATRON.

My objections to hearing this case are so strong, that I deem it proper to state them. This court stands exposed to impositions by fictitious cases more than other courts do, for several reasons. We have adopted it as a rule of practice, that third persons cannot be heard to prove before us that a case pending on our docket is feigned, and a decision sought at our hands intended alone to affect other men's rights, by combination of the parties of record.

In the case of Patterson *v.* Gaines, the attempt was made, but refused, because the persons applying to dismiss the case, were no parties of record, and had no right to be heard.

This of necessity throws us on the case itself, as here presented by the record, to ascertain whether it is fictitious. It is a case made on a certificate of division; and as those divisions of opinion are usually granted of course, on facts agreed by the parties, and as they have been ordinarily granted without examination on part of the court, by way of concession, if requested by both sides, (as is the case here,) we are very liable to be imposed on; certainly more so than other judicial tribunals, where certified cases are not allowed; and as the consequences here involved are uncommonly great, it is proper to observe unusual care to guard against imposition.

The consequences of our decision will be apparent from the following facts.

Military bounty lands were located and granted in Illinois for services rendered in the war of 1812, with Great Britian, in the name of each soldier, as it stood on the muster-roll. This grant enures to the benefit of his heir by act of Congress. The United States caused the lands to be located and patented in a body, exceeding three millions of acres, in what is known as the military tract in that State, which fronts on the Mississippi River, and is unsurpassed in fertility by any equal body of land on this continent.

The land in controversy is situated in this district, and is designated as the south half of section thirty-five, in township twelve north, of range one west of the fourth principal meridian.

Most of these grants remained without ostensible owners for many years, and have furnished, and continue to furnish, a great source of speculation. On them the tax laws of Illinois operated, and a great portion of them have been sold for taxes. This is a prominent part of the history of Illinois. It was

stated in discussion of the case of Bruce *v.* Schuyler (4 Gilman, 249), that eight millions of dollars worth had been thus sold, up to 1847. And, taking the State throughout, a much greater quantity than this, no doubt, is held under tax sales, and auditor's deeds, like the one before us. It conforms to the act of 1826, which prescribes a form, and applies to deeds founded on previous and subsequent tax sales. Auditor's deeds, in the military tract, are the most usual title. Under this state of things, that section of country has been settled and highly improved by a large population; cultivators confidently relying on these deeds as valid titles.

The Supreme Court of Illinois held, in the case of Garrett *v.* Wiggins, 1 Scammon, 335, that the act of 1829, declaring auditor's deeds, standing alone, as evidence of a good title, did not apply to sales made previous to the passing of that act. And the deed of Wiggins, not having been supported by extraneous proof that the land had been legally advertised for sale, was declared to have been made without authority, and was rejected. It follows, that all deeds founded on tax sales made before 1829 are void "on their face," when standing alone. They must be supported by the act of limitations, or fall to the ground; and this support we are asked to withdraw by our decision, proceeding on a case made up under the following circumstances.

On the cause being taken up for trial in the Circuit Court, plaintiff introduced his title, regularly derived from the United States. He admitted, by special agreement, that the defendants were in possession when the suit was brought. They then offered to prove that they had been seven years in possession, holding under a connected title derived from a public officer, authorized by law to sell the land for non-payment of taxes, and, as the first link in their chain of title, offered a deed made by the auditor, which is set out. To its introduction the plaintiff objected, on the ground that, by reference to the face of the deed, "and the law as it stood" when the sale was made, (to wit, "An Act entitled An Act for levying and collecting a tax on land, and other property," approved February 18, 1823,) it appeared that the sale for non-payment of taxes had been made by the auditor "at an earlier day than he could, according to law, possibly do; and so it occurred as a question, whether said deed was admissible in evidence for the purpose, and in the connection for and in which the defendants offered it, the objection aforesaid notwithstanding: on which question the opinions of the judges were opposed."

This is the case certified for our opinion. The parties agreed to the facts, made the case, and conjointly moved for a

certificate of division. It was especially the act of the defendants, as on their right to make defence we are asked to pass judgment.

It is agreed, that they held under a void deed; that it was not made according to law, and void on its face. They admit that the auditor did an act which he could not possibly do as auditor. Thus, the defendants by this agreement made the worst case for themselves that they could make, and the best case for their adversary that could be made up, for the purpose of having a decision against the defendants on the act of limitations. This is manifest, and not open to dispute. No power is left to this court to inquire whether the auditor had, or had not, authority to sell for taxes due in the years 1821 and 1822, by advertising in advance of October 1, 1823, for three weeks, and selling afterwards, in December, when the eighty-two days required by the act of 1823 had expired from the first advertisement.

The 26th section of the act declares, that the first sale of lands made by the auditor shall take place in December, 1823; at what time in December, the act does not provide. It depends on a true construction of the law. But the agreement cuts off all power of inquiring as to what the true construction of the law is; it concludes the question, and forces us to hold that the auditor sold without authority, and that his deed is void on its face; whereas the deed recites, that the land had been sold "in conformity with all the regulations of the several acts in such cases made and provided." It refers to no one particular law, and is fair on its face; nor could any man, not learned in the law, suppose to the contrary. Certainly not Illinois farmers, many of whom do not even read or speak our language.

In the next place, a written argument is furnished to us by the plaintiff, coming from Illinois, presenting his case in the most cogent manner, on which it is submitted; whereas, the defendants make no appearance here by counsel, set up no defence, but give the plaintiff every advantage he may desire, or can possibly have. As I have never known a real contest thus conducted, my mind is led to the conclusion, that this is a fictitious proceeding, intended to open a door for speculation, and to affect the rights of others, and that it ought not to be acted on by this court. But as a majority of my brethren are unwilling to dismiss the case, and have proceeded to decide the question whether a deed purporting to be founded on a tax sale, and which is void on its face (when compared with that law), furnishes color of title, I of course acquiesce, and will briefly examine that question.

For the purpose of arriving at a proper construction of the act of limitations of Illinois, the previous legislation of that State must be taken into consideration, so far as it can be done, from the meagre information we have been enabled to collect. From this legislation, so far as it is ascertained, it appears that the auditor was bound by law to make deeds to purchasers at tax sales, according to the prescribed form given by the act of 1826. These deeds were ordered to be recorded. The one before us is in the prescribed form, and stood duly recorded when the act of limitations was passed.

The act requires actual residence on the land for seven years, under a connected title deducible of record from the State, or from the United States, or from any public officer authorized by the laws of the State to sell lands for the nonpayment of taxes.

This act is peculiar in its terms, and was made under peculiar circumstances. It was unquestionably made, as it seems to me, to protect actual settlers and cultivators, whose titles were liable to exception, against speculators and others having better titles, but who should neglect to avail themselves of their legal advantage within the time limited. In order to make a successful defence, it was necessary for these defendants to prove a seven years' residence on the land, under a connected title deducible of record from the State of Illinois, or from some public officer acting for the State, authorized to sell for nonpayment of taxes. The auditor was such officer. He acted for the State; and a title in all respects emanating directly from the State is exhibited in support of a seven years' possession. A connection with a patent from the United States is equally clear. The land was assumed to be sold by force of lien for taxes due; such sale carried the true owner's title throughout, including the patent, regardless of the fact in whose name the land was advertised and sold. So the laws of Illinois expressly provide. No further connection of title can exist; nor does the act of limitations require more. But to avoid its force, an attempt is made to introduce an exception not found in the act, which of necessity comes to this, that if the deed is void for legal defect, or for a defect which depends on evidence, a link in the chain of title is wanting.

If it be true that the purchaser under a tax sale and deed is bound to ascertain the law, and if the deed is found to be void when tested by the law, and the acts done under it, no connection can be established, nor protection had, under the act of limitations; then the statute is a mere delusion, as it can only be resorted to where there is a good title.

The act was not thus idly made. It has no reference to

titles good in themselves, but was intended to protect apparent titles, void in law, and to supply a defence where none existed without its aid. Its object was repose. It operates inflexibly, and on principle, regardless of particular cases of hardship. The condition of society, and protection of ignorance as to what the law was, required the adoption of this rule. This is plainly so. It was not to be expected that immigrants into a new country like Illinois, who came there seeking lands for homes, were capable of judging what complicated revenue laws required to be done to make a valid tax sale. If they found a title of record from a public officer, such as the auditor was, having general power to sell for non-payment of taxes, they were authorized to believe such title a good one, and to purchase under it. And it would be bad policy, and unjust, after the land had been improved by their labor, and increased in value perhaps twenty-fold, during a long possession, to turn them off, even by a meritorious owner, if he did not come in time. And still worse policy would it be, to leave them open to speculating purchasers, buying up doubtful titles over their heads, under the act of 1845, which allows of such purchases in Illinois. Harassment and ruin inflicted on the unsuspecting many, by the well-informed and unscrupulous few, must be, as it ever has been, the consequence of stripping cultivators of the soil of their titles by unfavorable and strained constructions; and therefore acts of limitation have at all times been liberally construed to protect cultivators in homes where their families were, and had usually grown up. And as the act of Illinois applies to actual residents, and to no others, it is entitled to a liberal construction. The one contended for is, that he who takes title by deed of record, or under one claiming by deed of record, made by a public officer with general power to sell for non-payment of taxes, is bound to know the law authorizing the officer to sell and convey; and if he fails to ascertain the law by negligence, he is held to knowledge that power was wanting, if such be the fact; that, purchasing with presumed knowledge, his title is taken in bad faith; his deed is tainted with fraud, and is no deed, but is as blank paper; and being so, a link in the chain of title is wanting, and the statute cannot apply, for want of connection of title.

This is the sum and substance of the reasoning employed on behalf of plaintiff to reject the application of the statute. Now, is this a liberal construction? Is it not in effect a repeal of the statute, and the most harsh construction that can be given to it? As, if this assumption be true, no possible conveyance made by a public officer, which is void because the

requisite forms of law have not been complied with, can be maintained. All must equally fall, if not good in themselves, when compared with the law, and the acts required by law to be done before the sale is made.

We have been referred to various decisions which are supposed to support this doctrine, and especially to that made by the Court of Appeals in Kentucky in 1820, in the case of Skyles *v.* King, 2 A. K. Marsh. 385. This case has had controlling influence in our investigations; by far more than all others. It was this. The elder patent was made to King. Skyles claimed and held under a younger patent, and seven years' adverse possession. He was defendant. The statute of Kentucky declares, that to form the bar there shall be "a connected title in law or equity, deducible of record from the Commonwealth." On a trial before a jury, it was insisted that, by the terms of the act, it applied to the elder patent set up by plaintiff; that with his patent there must be connection to form a bar. And so the Circuit Court held the true meaning of the act to be, and so instructed the jury. But the Court of Appeals thought otherwise, and reversed the judgment, holding that the act meant a title tested by its own face; that is, commencing with the younger patent, and connecting with that, regardless of the elder and adversary title; that the act had no reference to the elder patent. There, the first link (the younger patent) was void, and this plainly appeared of record, as all patents in Kentucky are recorded; it follows, that, if that decision is adopted as a true construction of the Illinois statute, the case before us must be decided for the defendants; as here the first title paper offered by them is in the same condition as the younger Kentucky patent.

The cases in this court of Patton's Lessee *v.* Easton, 1 Wheat. 476, and of Walker *v.* Turner, 9 Wheat. 541, are also relied on as in point. The latter one is clearly so. It held that a void sheriff's deed was no deed, and could not be given in evidence as a link in the chain of title, nor be upheld by seven years' adverse possession, under the act of limitations of Tennessee, which required a title by grant, or deed of conveyance founded on a grant, to form a bar; and which was construed to require connection of title. This court followed the supposed settled construction of the courts of Tennessee on their own statute. But this was a mistake, there not being any such settled construction.

In 1832, the case of Green *v.* Neal, 6 Peters, 291, again brought before this court the same question on the Tennessee act. At that time, all controversy was settled by a decision of the Supreme Court of Tennessee, in the case of Gray and

Reeder *v.* Darby's Lessee, Martin & Yerger, 396, which held that a sheriff's sale and deed, made pursuant to a void judgment, in a case where no jurisdiction existed in the court entering such judgment, was a sufficient connection of title; that to hold otherwise would be requiring a good connected title, and a virtual repeal of the statute. This decision was followed in the case of Green *v.* Neal; and all the former cases decided by this court on the Tennessee act, holding that a void deed broke the connection, were overruled, and are of no authority anywhere. They merely followed a supposed settled construction in the first two cases, and a settled one in the last case of Green *v.* Neal. And so we would now be bound to follow the settled construction of the courts of Illinois, if any such existed, on the statute before us.

My opinion, therefore, is, that it ought to be certified to the Circuit Court, that the auditor's deed should be admitted in evidence, and that it furnishes color of title on which the act of limitations could operate.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Illinois, and on the point and question on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeable to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the paper offered in evidence by the defendant is a void deed on the face of it, and was not admissible as evidence for the purpose for which it was offered. Whereupon it is now here ordered and adjudged, that it be so certified to the said Circuit Court.

JOSEPH WEBSTER, PLAINTIFF IN ERROR, v. HUGH T. REID.

Where a judgment was rendered by the Supreme Court for Iowa Territory and the record certified to this court by the Supreme Court of the State of Iowa, after her admission into the Union, and the subject-matter is within the jurisdiction of this court, it will take jurisdiction over the case.

Where the legislature of the Territory of Iowa directed that suits might be instituted against "the Owners of the Half-breed Lands lying in Lee County," notice thereof being given through the newspapers, and judgments were recovered in suits so instituted, these judgments were nullities.

There was no personal notice to individuals, nor an attachment or other proceeding against the land, until after the judgments.

The law moreover directed that the court should decide without the intervention of a jury to determine matters of fact. This was inconsistent with the Constitution of the United States.

The court below erred in not permitting evidence to be offered to show that the judgments were fraudulent. It erred also in not allowing the defendant to give his title in evidence.

The defendant ought also to have been allowed to give evidence that the judgments had not been obtained in conformity with the law which required certain preliminary steps to be taken.

THIS case was brought up by a writ of error allowed by John F. Kinney, Judge of the Supreme Court of Iowa, on the 10th of November, 1847. The writ was issued, as usual, in the name of the President of the United States, and was addressed, "To the Honorable the Judges of the Supreme Court of the Territory, now State, of Iowa."

It was what was called an action of right brought by Reid against Webster, to recover the possession of 160 acres of land in Lee County, then in the Territory of Iowa. The suit was brought on the 1st of October, 1844.

The facts were these.

On the 4th of August, 1824, the United States made a treaty with the Sac and Fox Indians, by which a tract of country between the Des Moines and Mississippi Rivers was reserved for the use of the Half-breeds belonging to the Sac and Fox Indians. This treaty was ratified on the 18th of January, 1825.

On the 30th of June, 1834, Congress passed the following act (4 Stat. at Large, 740):—

"Be it enacted, &c., That all the right, title, and interest, which might accrue or revert to the United States, to the reservation of land lying between the rivers Des Moines and Mississippi, which was reserved for the use of the Half-breeds belonging to the Sac and Fox nations, now used by them, or some of them, under a treaty made and concluded between the United States and the Sac and Fox tribes or nations of Indians, at Washington, on the 4th of August, 1824, be, and the same are hereby, relinquished and vested in the said Half-breeds

of the Sac and Fox tribes or nations of Indians, who, at the passage of this act, are, under the reservation in the said treaty, entitled, by the Indian title to the same, with full power and authority to transfer their portions thereof, by sale, devise, or descent, according to the laws of the State of Missouri."

On the 16th of January, 1838, the territorial legislature of Wisconsin passed an act for the partition of the Half-breed lands, and for other purposes. The preamble to the act was as follows: —

"Whereas, it is expedient in order to the settlement of that tract of land lying between the Mississippi and Des Moines Rivers, commonly called the 'Half-breed lands,' which was reserved for the Half-breeds of the Sac and Fox tribes of Indians, by treaty made at Washington city, between the United States and those tribes, on the 4th of August, 1824, which was released to said Half-breeds, with power to convey their rights, &c., by act of Congress, approved the 30th of June, 1834, that the validity of the titles of the claimants should be determined, and partition of said lands among those having claims should be made, or a sale thereof, for the benefit of such valid claimants; now therefore, Be it enacted," &c.

The act directed that all persons claiming any interest in said lands should file, within one year, with the clerk of the District Court of Lee County, a written notice of their respective claims, &c. Edward Johnston, Thomas S. Wilson, and David Brigham were appointed commissioners to receive testimony concerning the validity of claims, who should be entitled to $ 6 per diem. The act consisted of twenty-four sections, and pointed out the manner in which the commissioners should discharge their duties. Certain persons were also appointed to sell portions of the land in order to pay all necessary expenses.

On the 22d of June, 1838, a supplement was passed, making certain changes, which need not be particularly noticed.

On the 25th of January, 1839, the Council and House of Representatives of the Territory of Iowa passed an act repealing the two preceding acts, and proceeding as follows: —

"Sect. 2. That the several commissioners appointed by and under that act to sit and take testimony, may immediately, or as soon as convenient, commence actions before the District Court of Lee County, for their several accounts against the owners of the said 'Half-breed lands,' and give eight weeks' notice in the Iowa Territorial Gazette to said owners of such suits; and the judge of said District Court, upon the trial of said suits before it at its next term, shall, if said accounts are deemed co cct, order judgment for the amount and costs to be

entered up against said owners, and said judgment shall be a lien on said lands, and a right of redemption thereto; said judgment, when entered, shall draw interest at the rate of twelve per cent. per annum.

"Sect. 3. The words 'Owners of the Half-breed Lands lying in Lee County," shall be a sufficient designation and specification of the defendants in said suits.

"Sect. 4. All the expenses necessarily incurred by said commissioners in the discharge of their duties under the above-named acts, shall be included in their accounts.

"Sect. 5. The trial of said suit or suits shall be before the court, and not a jury; and this act shall receive a liberal construction, such as will carry out the spirit and intention thereof.

"Approved, January 25, 1839."

At the August term, 1839, of the District Court for Lee County, Edward Johnston and David Brigham, two of the commissioners, recovered judgments against the owners of the Half-breed lands, as follows:—

"EDWARD JOHNSTON *v.* OWNERS OF THE HALF-BREED LANDS, lying in Lee County, I. T. — *In Debt.*

"Now comes the auditor, appointed by the court to examine, adjust, and allow the account of the plaintiff in the above-entitled cause, to wit, H. T. Reid, Esq., and makes report that he finds the sum of $1,290 to be due from said defendants to said plaintiff, which report is accepted by the court. Whereupon, it is ordered by the court, that the plaintiff recover of the defendants the sum of $1,290, together with his costs of suit in this behalf expended."

"DAVID BRIGHAM *v.* THE OWNERS OF THE HALF-BREED LANDS, lying in the County of Lee. — *In Debt.*

"Now comes the auditor, appointed by the court to examine, adjust, and allow the account of the plaintiff in the above-entitled cause, to wit, Oliver Weld, Esq., and makes report that he finds the sum of $818 to be due from the said defendants to said plaintiff; which report is accepted by the court. Whereupon, it is ordered by the court, that the plaintiff recover of the said defendants the sum of $818, the amount stated in the auditor's report, and costs in his behalf expended."

On the 26th of November, 1841, executions were issued upon the above two judgments.

On the 1st of December, 1841, the sheriff levied the executions "on the Half-breed tract of land, situated between the Mississippi and Des Moines Rivers, granted by treaty to the

Half-breeds of the Sac and Fox tribes of Indians," and advertised the same for sale on the 1st of January, 1842.

On the 1st of January, 1842, the sheriff sold the land, containing 119,000 acres, more or less, to Hugh T. Reid, for the sum of $ 2,554.66.

On the 2d of January, 1843, William Stotts, sheriff of Lee County, and successor of the sheriff who had made the sale, executed a deed to Reid for the following tract, viz.: —

"All that tract of land lying between the Mississippi and Des Moines Rivers, and south of a line drawn from a point on the Des Moines River, opposite the point where the northern boundary of the State of Missouri strikes the same, to the Mississippi, commonly known as the Half-breed lands lying in Lee County, and containing 119,000 acres, more or less; the said tract of land lying, being, and situate in the county of Lee and Territory of Iowa aforesaid, with all the right, interest, claim, and demand of the said owners of the Half-breed lands lying in Lee County, in, over, and to the same, and every part and parcel thereof; to have and to hold all the above-granted premises and appurtenances thereto belonging, or in any wise appertaining, to the said Hugh T. Reid, his heirs and assigns for ever.

On the 1st of October, 1844, Reid brought a suit against Webster, and filed the following declaration: —

"*Territory of Iowa, Lee County, ss.*

"HUGH T. REID *v.* JOSEPH WEBSTER.

"Hugh T. Reid claims against Joseph Webster a tract of land, with the appurtenances, lying in the county aforesaid, and described as follows, to wit, the northeast quarter of section 12, in township 67 north, and range 5 west, containing 160 acres, more or less; and thereupon the said Hugh T. Reid says that he has right to the immediate possession of said property, and to the ownership thereof in fee simple, and also to damages for its detention, and offers to prove that such is his right. H. T. REID, *Attorney for himself.*"

The defendant put in the following plea: —

"*Territory of Iowa, Lee County, sct.*

"District Court of said County, October Term, 1841.

"Joseph Webster denies the right of Hugh T. Reid to the tract of land, with the appurtenances, and damages for the detention thereof, as set forth in his declaration, or to any part thereof; and hereupon he prays a jury to determine the truth of this plea.

"MILLER, MILLS, & COCHRAN, *for Defendant.*"

On the 12th of May, 1845, the cause came on for trial, when the verdict of the jury was for the plaintiff.

There were eight bills of exceptions taken in the progress of the trial, which occupied twenty-six pages of the printed record. Into them were incorporated long legislative acts and deeds, of which a summary is given above.

Instead of transcribing these long exceptions, it will be sufficient to state the points involved.

First Exception.

The plaintiff offered in evidence the two judgments given in favor of Johnston and Brigham.

This was the first evidence offered by the plaintiff to the jury. The defendant objected to the admissibility of the judgments, as being rendered without jurisdiction; but the court overruled the objections, and admitted the records, to which the defendant excepts, and prays the court to sign and seal this his first bill of exceptions, which is done at the time the same was taken on the trial.

CHARLES MASON, *Judge.*

Second Exception.

The plaintiff offered in evidence the above judgments, the executions issued thereon, the sheriff's return and deed to Reid; then a witness to prove that Webster was in possession of the land mentioned in the declaration, and had been so since the year 1839 or 1840, and that the land was within the Half-breed reservation; and then the various legislative acts.

The defendant then moved the court to enter a nonsuit against the plaintiff, which motion was overruled by the court, to which ruling and decision the defendant excepts and prays, &c.

CHARLES MASON, *Judge.*

Third Exception.

Be it known, that on the trial of this cause, after the plaintiff had closed his evidence, and defendant had moved the court for a nonsuit, as stated in a bill of exceptions numbered two in this cause, the defendant offered to prove to the jury that the judgments, executions, sheriff's sale, and sheriff's deed, constituting the evidence introduced by plaintiff, was all procured by fraud by said plaintiff and others, and that the whole title of plaintiff is based upon fraud and fiction; to the introduction of which evidence the plaintiff objected, and the court sustained the exception, and ruled that such evidence should not be admitted; to which defendant excepts, and prays the court to sign and seal this bill of exceptions.

CHARLES MASON, *Judge.*

Fourth Exception.

The defendant then offered evidence to show the condition of the Half-breeds, and then the following deeds:—

1837, March 3. Na-ma-tau-pas, a Half-breed, to John Bond.

1837, March 20. John Bond to Theophilus Bullard.

1838, April 7. Bullard to Webster, the defendant.

The plaintiff objected to the introduction of any of the said deeds, and the court sustained the objection, and ruled that they should be excluded from the jury, to which opinion the defendant excepts, and prays the court to sign and seal this bill of exceptions.

CHARLES MASON, *Judge.*

Fifth Exception.

Be it known, that on the trial of this cause the defendant proved that he acquired the possession of the premises described in plaintiff's declaration by a purchase, as set forth in deeds included in defendant's fourth bill of exceptions, in the year 1838; that at the time he purchased there were improvements on said tract, and that he took possession, and has been in possession ever since. The defendant then produced evidence, and offered to prove by parol testimony, that no service had ever been made upon any person in the suits in which the judgments were rendered upon which the sale was made to plaintiff, as set forth in defendant's second bill of exceptions, which bill is referred to here, and made a part of this; that no notice was given by publication of the pendency of said suit; that the plaintiff was the counsel that procured said judgments; that said judgments were rendered upon a fictitious demand, and never proven before the auditor; that Webster and the owners of the Half-breed tract of land, or some of them, were prevented from appearing and defending by the fraudulent representations of said plaintiff; that the sale was in fact never made by the sheriff, Taylor; that the whole return of the sheriff, Taylor, was a fraudulent and false return. The plaintiff objected to the introduction of every part of said testimony, and the court ruled and decided that no part of said evidence was admissible, and ruled that the defendent should not introduce evidence to prove any of the facts above stated; to which ruling and decision the defendant excepts.

CHARLES MASON, *Judge.*

Sixth Exception.

Be it known, that on the trial of this cause the defendant filed an affidavit, as follows, to wit: "Joseph Webster, makes oath and says that a certain deed, executed by Hawkins Tay-

lor, sheriff and collector of Lee County, to R. F. Barrett, dated the 27th of September, 1841, and recorded in Lee County, is not in his power to produce on this trial, and is material evidence in his behalf, to be read in the said trial of H. T. Reid *v.* said Webster, as he is advised by his counsel.

"JOSEPH WEBSTER.

"Sworn and subscribed to before me, this 15th of May, 1845.

"J. C. WALKER, *Clerk.*

By J. G. WALKER, *Deputy.*"

After which, offered the recorder's record of Lee County as evidence of the deed mentioned in the affidavit. The plaintiff objected, the court sustained the objection, and ruled that the record of the deed should not be introduced as evidence; to which the defendant excepts and prays, &c.

CHARLES MASON, *Judge.*

Seventh Exception.

The plaintiff offered in evidence the judgments, the execution, and the deed of the sheriff to Reid, the same as mentioned heretofore. The defendant excepted, but the court overruled the objection and admitted the deed, to which ruling the defendant excepts and prays, &c.

CHARLES MASON, *Judge.*

Eighth Exception.

Be it remembered, that, on the trial of this cause, the plaintiff proved nothing in addition to the evidence introduced as set forth in bill of exceptions number two; all the evidence given to the jury by the plaintiff, on examination in chief, or in rebutting evidence, is the evidence contained in defendant's bill of exceptions on the motion to nonsuit plaintiff, and it is here referred to and fully admitted.

Upon this state of facts the defendant prays the court to instruct the jury as follows, to wit:—

1st. That, unless it was proved to the satisfaction of the jury that there was some person or persons within the Territory of Iowa, at the time of the issuing of the process, or appeared at the trial, or at some stage of the proceedings, that were within the jurisdiction of the District Court of Lee County, during the pendency of the suits of Johnston and Brigham, upon which this title accrued, that owned or had an interest in those lands, they must find for the defendant.

2d. That unless they find, from the evidence, that there were owners, and persons or corporations, other than the government, who were owners, or had an interest in said land, at

the commencement of these suits by Johnston and Brigham, they must find for the defendant.

3d. That unless the jury find that some one or more of the owners of the Half-breed tract of land were citizens of the Territory of Iowa at the time of the passage of the act of Iowa legislature, passed January 25th, 1839, or between that time and the time of the execution of the deed by the sheriff to the plaintiff, they must find for the defendant.

4th. That unless it has been proved to the jury that the defendants sued by Johnston and Brigham, and upon whose judgments the plaintiff claims his title, were a corporation by virtue of law, and acting as such, are liable as such, or a partnership firm by that name, or some kind of an association who had assumed the name of Owners of the Half-breed Lands in Lee County, the plaintiff cannot recover.

5th. That if it is not proved to the jury that the judgments of Johnston and Brigham were rendered against some person or persons, body corporate or association of individuals, whose existence has been proved to exist at the commencement of the suit, or at the rendition of the judgments, they must find for the defendant.

6th. That a judgment against a dead person, or a person who has no existence whatever, is no judgment at all in contemplation of law, and a sale under such a judgment is void.

Which said instructions, so prayed for by the defendant, as above stated, to be given severally as stated above to the jury, the court refused to give, and the court refused each and every instruction, severally above prayed for, as mentioned from one to six; to which refusal, and ruling, and decision of the court the defendant excepts, and prays the court to sign and seal this bill of exceptions.

CHARLES MASON, *Judge.*

It has already been stated, that the jury found a verdict for the plaintiff. Webster, the defendant, sued out a writ of error, and carried the case to the Supreme Court.

In January, 1846, the Supreme Court of the Territory of Iowa affirmed the judgment of the court below, when Webster brought the case up to this court.

It was submitted upon printed argument by *Mr. Dixon*, for the plaintiff in error, no counsel appearing for the defendant in error.

Mr. Dixon, for plaintiff in error.

We allege that the court below erred, —

1st. In admitting the judgments of Johnston and Brigham,

the executions, the levies, the sheriff's returns and sheriff's deed under them, or either of them, as evidence of title in Reid, the defendant in error; and

2d. In excluding the evidence offered by Webster, the plaintiff in error, to defeat the alleged title of Reid.

And first, in admitting these judgments of Johnston and Brigham, and the proceedings under them, as evidence of title in Reid.

These judgments were rendered under and by virtue of a law of the territorial legislature of Iowa, passed the 25th of January, 1839.

Admitting for the present the entire validity and constitutionality of the above law, yet Reid, in order to avail himself of it, and establish a valid title under it, must show a strict compliance with all its provisions. The affirmative rests with him. It being a statute conferring a special and extraordinary remedy, such a one as is unknown to the common law, no presumption or intendment will be made in favor of a judgment acquired under it, but the party claiming must show that he has conformed to its enactments.

And whether the court rendering these judgments was one of special or of general jurisdiction is immaterial; the legal principle and the reason remain the same. If the remedy is summary and unusual in its character, a compliance with the statute must be affirmatively shown, in whatever court that remedy is sought to be enforced. The court acquires jurisdiction in this case by virtue of the statute alone; without it the court would be powerless; and to justify its action there must be affirmative evidence of a substantial compliance with the requisition of the law from the inception of the suit to its consummation. This principle of law is well established, and but few authorities are necessary to support it. See 3 Phil. & Cowen on Evidence, 946, 987, 988, 989, 1016, and cases there cited; 6 Wheat. 49.

In Massachusetts, it is stated, where a statute gives a new power, and at the same time provides the means of executing it, those who claim the power can execute it in no other way. Andover and Medford Turnpike Co. *v.* Gould, 6 Mass. 40. See also 14 Mass. 286; 1 Black. 39. And where a summary remedy is given by statute, those who wish to avail themselves of it must be confined strictly to its provisions, and shall take nothing by intendment. Logwood *v.* Huntsville, Minor, 23; Childress *v.* McGehee, Ib. 131; Crawford *v.* State, Ib. 143; Yancy *v.* Hankins, Ib. 171. And as to the same doctrine, see 1 Mass. 103; 2 Yerg. 486, 493; 10 Wend. 75.

And where a court of general jurisdiction has special au-

thereby conferred upon it by statute. It is good for an inferior or limited court. 4 Phil. & Cowen on Evidence, 346, cites 6 Wheat. 119; 12 Wheat. 213.

In Denning v. Corwin, 11 Wheat. 647, there was a judgment in personam; and because it did not appear by the record that the parties were before the court, or shown to the court that the owners were unknown, it was held to be void. The court in this case was one of general jurisdiction.

In Kentucky the court say that statutes authorizing proceedings against absent defendants and unknown heirs upon constructive notice by publication, must be strictly pursued. Brown v. Wood, 6 J. J. Marsh. 11, 14, 29, 30, 193, 197.

In this court the same principles have been fully sustained. Stead's Executors v. Course, 4 Cranch, 403. The principle is laid down, that a collector in the sale of land must act in conformity with the law, and the purchaser is bound to inquire whether he has so acted.

Williams et al. v. Peyton's Lessee, 4 Wheat. 77. It is said that in all cases of a naked power not coupled with an interest, the law requires that every prerequisite to the exercise of that power must precede its exercise; and in the same case, in speaking of publications, the court say, "The purchaser ought to preserve these gazettes, and the proof that these publications were made."

And in Thatcher v. Powell, 6 Wheat. 119, the court proceeded to say: "Previous to an order for a sale of land, and subsequent to the report of the sheriff, certain publications are to be made, in the manner and form prescribed by the act. These publications are indispensable preliminaries to the order of sale. They do not appear to have been made. The judgment against the land was given at the January term, 1802, on motion, without its appearing, by recital or otherwise, that the requisites of the law in this respect had been complied with, and that the tax still remained unpaid. We think this ought to have appeared on the record. The argument is, that the judgment for these errors in the proceedings of the county court may be voidable, but is not void; that until it be reversed, it is capable of supporting those subsequent proceedings which were founded on it.

"We think otherwise. In summary proceedings, where a court exercises an extraordinary power under a special statute prescribing its course, we think that course ought to be exactly observed, and those facts especially which give jurisdiction ought to appear in order to show that its proceedingr are *coram judice*." See also to same point, Ronkendorff v. Taylor's Lessee, 4 Peters, 359.

In Bloom v. Burdick, 1 Hill, (N. Y.) 141, the court say that, "in every form in which the question has arisen, it has been held, that a statute authority by which a man may be deprived of his estate must be strictly pursued." The same doctrine will be found in Rea v. McEachron, 13 Wend. 465; Atkins v. Kinnan, 20 Wend. 241; and in Jackson v. Shepard, 7 Cowen, 88, as cited in 1 Hill, *supra*.

In Jackson v. Esty, 7 Wend. 148, C. J. Savage says: "It is a cardinal principle, that a man shall not be divested of his property but by his own acts, or the operation of law; and where proceedings are instituted to change the title to real estate by operation of law, the requirement of the law under which the proceedings are had must be strictly pursued." And "when laws are to be taken under a statute authority, in derogation of the common law, every requisite of the statute having the semblance of benefit to the owner must be strictly complied with." Sharp v. Johnson, 4 Hill, (N. Y.) 99; Atkins v. Kinnan, 20 Wend. 241.

In the case in 1 Hill, the decision of the court in Denning v. Corwin, 11 Wend. 647, is restricted to the facts before the court. The broad doctrine, that the judgment of a superior court is void if the record do not show jurisdiction, is denied; but it is not denied that the judgment of a superior court in summary proceedings, where it exercises an extraordinary power under a special statute prescribing its course, is void, if the record do not show jurisdiction. See Foot v. Stevens, 17 Wend. 483, and Hart v. Seixas, 21 Wend. 40.

Can there be a doubt of this being a law giving a special and extraordinary remedy? Does it not conflict with the modes of judicial procedure known to the common law? Let us examine its peculiar provisions for a moment. It is made for the benefit of three persons alone, and none others; it is passed to authorize the collection of accounts accruing by virtue of a law of doubtful constitutionality, without showing any special necessity for legislative interference; it waives all personal service of notice upon the defendants, and substitutes constructive notice by publication; it authorizes suit against a something by the designation of the "Owners of the Half-breed Lands in Lee County," and not against any individual by name; it allows interest upon its judgments at the rate of twelve per cent. per annum, when six per cent. was the established rate. See Laws of Iowa (1839), p. 276. It gives to the commissioners their expenses in addition to their *per diem* allowance, while no expenses were allowed them by the act establishing the commission; it then composedly sets at defiance the Constitution of the United States, and the Ordinance

of 1787, by prohibiting the trial by jury, and in conclusion, with an effrontery only surpassed by its absurdity, requires the court to give to it a "liberal construction."

We think, then, we are correct in pronouncing it a special and extraordinary statute; remarkable for the modest learning and critical sagacity it displays in constitutional and common law jurisprudence; and still more remarkable for the nice sense of justice it manifests to extend exact and even-handed justice to the citizen. Surely the poet was rapt in prophetic vision when he exclaimed, "A little learning is a dangerous thing."

We now contend that it was necessary for Reid, in order to recover under this law, to have shown, —

1st. The existence of a corporation, association, or company, legally constituted, and clothed with authority to sue and be sued by the designation of the "Owners of the Half-breed Lands lying in Lee County."

2d. That such company were the owners of the land in controversy, or that Webster, or some one under whom he claimed, was in fact an associate or member of such company, and bound by its acts.

3d. That eight weeks' notice of such suit was published in the Iowa Territorial Gazette; and

4th. That the trial took place before the Lee County District Court, and not before a jury.

Now it appears from the bills of exceptions, that not one of these things was shown or in proof on the trial of this cause, and that the recovery was had upon the production of the judgments alone.

In this case Reid recovered by virtue of judgments against "Owners of Half-breed Lands," &c. This is not the name of an individual. It is not a name known to the law, except as an incorporation. There ought to have been an averment and proof of the existence of such a corporation. Louisville Railroad Co. *v.* Letson, 2 Howard, 497. See also Williams *v.* Bank of Michigan, 7 Wend. 540; Welland Canal Co. *v.* Hathaway, 8 Wend. 480. In Portsmouth Livery Co. *v.* Watson, 10 Mass. 91, it is said that the existence of private incorporations, established by the laws of Massachusetts, and that of all corporations established by the laws of other States, must be proved as a fact.

But again, the fact of the defendants being denominated "Owners," &c., did not, *per se*, constitute them owners, nor confer any title to the farm in litigation upon them, notwithstanding it might be situated within the boundaries of the Half-breed tract. It was, therefore, indispensable either to have

shown title in those "Owners," deduced from some common source, or to have connected Webster with the company, by the name of "Owners," &c. Neither was done; and we conceive this to be fatal to Reid's recovery. A special statute, incorporating certain persons for purposes of private advantage or emolument, does not bind (say the courts) any person named therein, unless he consent thereto. Ellis *v.* Marshall, 2 Mass. 269; Little *v.* Frost, 3 Ib. 106, 116. And in Beatty *v.* Lessee of Knowles, 4 Peters, 167, it is decided that a private act of incorporation cannot affect the rights of individuals who do not assent to it; and that in this respect it is considered in the light of a contract, is a position too clear to admit of controversy. How, then, are we to be bound, or our rights affected, by a judgment against a company, the existence of which is not proved, in whom no title is shown, and as to whom we are strangers?

We were in possession of the property, and had been in possession for several years, and possession is *primâ facie* evidence of title and ownership. Adams on Eject. 32 and notes; Ib. 319, note 2; Jackson *v.* Hillsborough, 1 Dev. & Batt. 177. And the law will never construe a possession tortuous, except from necessity; but will consider every possession lawful, the commencement and continuance of which are not proved to be wrongful. 5 Cond. R. 242. Such being the presumption of law, what evidence is introduced by Reid to destroy that presumption? The "Owners," &c. are not proved ever to have been in possession, nor ever to have held or claimed any title. What semblance of right or virtue, then, is there in these judgments, unaided by other proof, that we should be dispossessed of our property, and deprived of our home. We humbly conceive there is none. We have no connection with these assumed "Owners," &c. We claim by distinct title; and unless Reid shows their legal existence, and title in them, from some common source, or connects us with them, he cannot recover from us, or affect our interests.

It was also necessary for Reid to have shown on the trial, that there was eight weeks' notice of the commencement of these suits published in the Iowa Territorial Gazette, previously to the entry of the judgments. This is a distinct and substantive requirement of the law. Without such published notice, the court had no power to render judgment. It was indispensable to jurisdiction. It is not pretended that any such proof was offered, and can it be said that this was not indispensable? Here the law dispenses with all personal service; no human being, no legal body, is required to be notified according to the mode pointed out by the common law, by rea-

son, and by common justice. Constructive notice is substituted. A mere publication for a short period of time, addressed to an unknown body, is declared to be sufficient. Can it be that it is not necessary to prove this publication, as preliminary to the introduction of the judgments in evidence? Is the principle, consecrated by the venerable system of the common law, and incorporated into our constitutions, that no person shall be deprived of his property unless by due process of law, to be thus trifled with and frittered away? This court has always appreciated and held sacred this right of the citizen to due notice of judicial proceedings against him; and it affords us pleasure to quote its bold and eloquent language. In Shriver's Lessee *v.* Lynn et al., 2 Howard, 60, the court say, "No court, however great may be its dignity, can arrogate to itself the power of disposing of real estate without the forms of law. It must obtain jurisdiction of the thing in a legal mode. A decree without notice would be treated as a nullity."

And whenever original jurisdiction is exercised, "It is admitted that the service of process or notice is necessary to enable a court to exercise jurisdiction in a case; and if jurisdiction be taken where there has been no service of process or notice, the proceeding is a nullity. It is not only voidable, but it is absolutely void." Lessee of Walden *v.* Craig's Heirs et al., 14 Peters, 154.

In Hollingsworth *v.* Barbour et al., 4 Peters, 475, the court say, "It is an acknowledged general principle, that judgments and decrees are binding only upon parties and privies. The reason of the rule is founded in the immutable principles of natural justice, that no man's rights should be prejudiced by the judgment or decree of a court, without an opportunity of defending the right."

Now what opportunity does it appear that we have had to defend our right? None whatever.

There are many decisions showing the necessity of publication, and proof thereof, in order to confer jurisdiction.

In Denning *v.* Corwin, 11 Wend. 647, above cited, the court state, that the New York statute of partition gives the court no jurisdiction to take any step against unknown owners until notice has been published according to the statute, and this must appear by the record.

It is not sufficient that an order of publication is had in a chancery cause; proof of the publication must also be made. 4 Equity Dig. 488, § 20, cites 4 Stew. & Port. 84.

If a decree be taken by publication against an absent defendant, the statements in the bill are not evidence in any collateral contest. 3 Equity Dig. 389, § 2.

A printer's certificate of publication of an order against non-residents must be copied in the record. A statement that it was filed is insufficient to show that the defendant has proper notice. 3 Equity Dig. 525, § 2, cites 3 J. J. Marsh. 105.

A recital in a decree of the publication of the order against an absent defendant does not prove it, but the evidence must be filed. 3 Equity Dig. 552, § 3; 4 Monroe, 544.

And in 1 McLean, 321, it is decided that facts must be stated to enable the court to judge. A statement by the auditor, that land was legally advertised and sold, cannot be received as evidence; facts must be stated. In Parker *v.* Rule's Lessee, 9 Cranch, 64, cited in 4 Cond. R. 397, a sale was declared to be invalid because it did not appear in evidence that the publications required by the ninth section of the act had been made; the court inferred that they had not been made, and considered the case as if proof of the negative had been given by the plaintiff in ejectment. The same point was decided in 4 Cond. R. 397.

Other decisions might be introduced, but the above abundantly establish the doctrine for which we contend: that the defendant must have the notice required by law; and when the statute prescribes a kind of notice differing from the common law mode, a compliance with such statute must be affirmatively shown. If the publication pointed out by law was necessary to jurisdiction, and the court cannot presume the fact of publication unless from proof, then the omission of such proof on the trial by Reid is equivalent, as far as we are interested, to an established want of jurisdiction in the court pronouncing these judgments. Jurisdiction is defined to be the power to hear and determine; this power can only be brought into exercise by publication; there is no evidence of publication in this case, and as it cannot be presumed, the consequence is obvious, that these judgments were void acts, without validity, and incapable of conferring powers or rights. For wherever a court acts without jurisdiction, its decrees, judgments, and proceedings are absolute nullities, powerless as evidence for any purpose whatever. "They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences are considered in law trespassers. This distinction runs through all the cases on the subject, and it proves that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court where the proceedings of the former are relied on, and brought before the latter by the party claiming the benefit of such proceed-

ings." Elliott et al. *v.* Peirsol et al., 1 Peters, 340. See also 5 Cond. R. 758; 2 McLean, 477; 13 Peters, 511; and especially, Lessee of Hickey et al. *v.* Stewart et al., 3 Howard, 762, where the whole doctrine is well laid down.

The judgments ought not to have been admitted in evidence on the trial in this cause, for the further reason, that upon their face they appear to have been respectively founded upon the report of an auditor appointed by the court, which report the court merely confirmed. The examination of witnesses and vouchers, and the ascertainment of the amount of indebtedness, were all performed by the auditor, and not by the court. The auditor does not return the facts and evidence upon which his report is based, and from which his conclusions are drawn, so that the court might exercise a judicial judgment over it, but he simply specifies the amount he finds to be due, and upon which finding and statement the court enters up judgment. Now the law requires the trial to take place before the court. It gives no power of substitution to the judge. It nowhere speaks of an auditor or any other auxiliary officer acting in the matter. It conferred power upon the judge alone; and it is well settled, that judicial power cannot be delegated unless expressly authorized by law. The legislature enacting this law demonstrate their unbounded confidence in the judge by abolishing the trial by jury, and at the same time clothing him with magisterial authority over the whole matter in the nature of a personal and judicial trust. The recitals in the judgments themselves show that he did not exercise any judgment in the matter. How could he have done so, when he placed his judgment and his conscience in the keeping of another? To say the least, there was a great want of ordinary prudence and circumspection on the part of the court, if there was not a palpable and inexcusable violation of duty. It is enough that we are deprived of a jury, without also being deprived of a judge, in pronouncing these judgments which are now brought forward under color of law to filch from us the hard earnings of years of toil. For all practical purposes, the auditor, and not the court, pronounced these judgments.

The above reasoning is predicated of the supposition, that the act under which those judgments were rendered was a valid and constitutional law. This we deny. We feel confident in affirming that the act never had a valid existence. A legal judgment never could be recovered under it. Having no power, it could confer no power. No judicial tribunal could confirm or transmit any rights through its instrumentality. It was utterly powerless for any valid purpose whatever. And our reasons are —

1st. It was made in subversion of principles of common right, and therefore void. It attempts to do away with the necessity of personal service of process in the commencement of actions. This, as we have shown, would endanger the safety of persons and property. It aims to give to three persons extraordinary and additional privileges and remedies in the collection of their debts, which are not given or extended to others. It is thus exclusive, operates partially, and is against common right. It directly gives to them a rate of interest upon their judgments double what the laws of Iowa give to any other citizen. No reason is assigned, and no necessity shown to exist, for awarding such a preference; and this is also against common right. Now the cases say that statutes passed against the plain and obvious principles of common right and common reason are null and void, so far as they are calculated to operate against these principles. Ham *v.* Mac-Claws, 1 Bay, 93, and see Morrison *v.* Barksdale, Harper, 101.

2d. It is in violation of the Constitution of the United States, of the Ordinance of 1787, and of the organic law of 1838, establishing the territorial government of Iowa.

The Constitution of the United States guaranties the right of trial by jury. Amendment to Constitution, Article 7.

The Ordinance of 1787, organizing the Northwestern Territory, art. 2, secures to its inhabitants the trial by jury, that all judicial proceedings shall be according to the course of the common law, and that no man shall be deprived of his property but by the judgment of his peers, or the law of the land. And the organic law of 1838, sect. 12, extends to the inhabitants of Iowa the rights, privileges, and immunities previously granted and secured to the inhabitants of Wisconsin, and of course includes the above provisions in the Ordinance of 1787.

The fifth section of the law in question provides, "that the trial of said suit, or suits, shall be before the court, and not a jury."

Now, it would appear to be sufficient, to place these constitutional and organic restrictions upon the territorial legislature in juxtaposition with the above legislative provision, in order to demonstrate their absolutely irreconcilable character. The statement itself would seem to involve an inconsistency so glaring, that all reasoning upon it would be superfluous. But as it is a constitutional inquiry, involving the validity of legislative enactment, and in its determination affecting deeply the interests and rights of the citizen, it may not be improper to examine briefly the laws and the authorities on the subject;

for whatever jeopardizes for a moment the integrity of the trial by jury ought to be strictly scrutinized and condemned.

"The impartial administration of justice," says an eminent jurist, "which secures both our persons and our properties, is the great end of civil society; and it is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals." This was written nearly a century ago, and is equally true now as then. The right is as sacredly cherished and vigilantly guarded as ever. "It is enthroned in the hearts of the people, it is enshrined in the sanctuary of the Constitution, and as well might the frantic suicide hope that the act which destroys his miserable body should extinguish his eternal soul," as any individual or body of men expect with impunity to attack or overthrow this glory of the law and invaluable privilege of the citizen. See Parsons *v.* Bedford, 3 Peters, 446.

We suppose it will not be controverted, that territorial legislatures are restricted in the exercise of legislative power to such as is expressly given them by the law of Congress organizing the territorial government. That law constitutes their charter; under it they act, and by virtue of it alone are their acts valid. Judge Story says: "As the general government possesses the right to acquire territory, either by conquest or by treaty, it would seem to follow, as an inevitable consequence, that it possesses the power to govern what it has so acquired. The territory does not, when so acquired, become entitled to self-government, and is not subject to the jurisdiction of any State. It must consequently be under the dominion and jurisdiction of the Union, or it would be without any government at all." 3 Story on Const. 193, 194; American Ins. Co. *v.* Canter, 1 Peters, 511.

And again: "What shall be the form of government established in the territories depends exclusively upon the discretion of Congress. Having a right to erect a territorial government, they may confer on it such powers, legislative, judicial, and executive, as they deem best." See 3 Story on Const. 195.

Territories are, then, nothing but political corporations, exercising such powers alone as are conferred by the charter of incorporation, or act organizing them. We examine this charter or act, and find that the Ordinance of 1787 is adopted as a part of it; and in that Ordinance are contained the restrictive enactments above enumerated. We suppose, also, that in the construction of these provisions we must refer to the expositions and decisions of the common law, wherein these provisions

have received an appropriate and determinate signification. When we adopt the common law, or portions of it, we also adopt the established adjudications upon them. It may be true that the common law of England is not, in all respects, to be received as the law of America. This court has said, "Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation." Van Ness *v.* Packard, 2 Peters, 144.

The words "trial by jury" and "judgment of his peers" would seem to be nearly equivalent in meaning. A trial by a jury is "a trial by twelve of the party's peers"; and the judgment of his peers means, "trial by a jury of twelve men, according to the course of the common law." 2 Kent's Com. 12, 13, note b.

The clause "law of the land" signifies, that statutes which would deprive a citizen of the rights of person or property without a regular trial, according to the course and usage of the common law, would not be the law of the land in the sense of the ordinance. See Hoke *v.* Henderson, 4 Dev. (N. C.) 15.

In Taylor *v.* Porter, 4 Hill (N. Y.), we have the same doctrine. "The words 'by the law of the land,'" say the court, "do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense."

"By the law of the land," says Lord Coke (2 Inst. 45 – 50), "is meant 'by the due course and process of law.'" It does not mean a mere act of the legislature, for such a construction would remove all limitation on legislative authority, and destroy the restrictive power of the above constitutional provisions. As originally used in Magna Charta, ch. 29, it was understood to mean due process of law. See 2 Kent's Com. 13, note b, and In the Matter of John and Cherry Streets, 19 Wend. 659. And Justice Story says, the clause "by law of the land" meaneth due process of law, and which in effect affirms the right of trial according to the process and proceeding of the common law. 3 Story on Const. 661. See also 1 Tucker's Black. Com., App. 304, 305.

The words, "of judicial proceedings according to the course of the common law," would appear to be, not only in affirmation of the security afforded by the provision "the law of the land," but in extension of it to all judicial proceedings in the progress of litigation, and which are known to the common law.

The words "common law," as used in the Constitution,

have received a judicial interpretation. The phrase "is used in contradistinction to equity, and admiralty, and maritime jurisprudence. It means not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and maritime law, and equity, was often found in the same suit." "In a just sense" (the seventh amendment of the Constitution) "the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." Parsons *v.* Bedford, 3 Peters, 446, 447.

(The counsel then proceeded to argue that this statute was against the organic law of Iowa, and the second article of the Ordinance of 1787; and that if the law was void, the judgments under it were equally so. He then argued that jurisdiction over this Indian reservation remained in Congress, which had never transferred it to the Territory; that the defendant below had a right to show an outstanding title, and also to show fraud in the original judgments and subsequent proceedings therein. The reporter has already allotted a large space to the argument, and regrets that he cannot insert the views of the counsel upon these points.)

Mr. Justice McLEAN delivered the opinion of the court.

This case is brought here by a writ of error to the Supreme Court of Iowa.

A judgment was obtained by the defendant, Reid, against the plaintiff in error, Webster, at May term, 1845, in the District Court of Lee County, Iowa Territory, for the recovery of a quarter-section of land; which judgment was removed by writ of error to the Supreme Court of the Territory; and afterwards, at January term, 1846, the judgment of the District Court was affirmed.

On the 3d of March, 1845, an act was passed by Congress, to admit the State of Iowa into the Union. By the fifth section of that act, it was made a fundamental condition to the admission of the State, that certain provisions of the act should be "assented to by a majority of the qualified electors at their township elections," on which the President was required, by proclamation, to announce the admission of the State into the Union.

The judgment in this case was rendered by the territorial court, before the State of Iowa had been admitted. The writ

of error from that court was directed to the Supreme Court of the Territory, and the record has been certified in obedience to it by the Supreme Court of the State, where, it seems, the records of the territorial Supreme Court are deposited.

As this proceeding was commenced and consummated in the territorial courts, over which this court can properly exercise a revisory jurisdiction, the District Court of the United States would have been a more appropriate deposit for the record. But, under the circumstances, this is not considered material to a revision of the proceedings, no mandate being required to give effect to the judgment of this court.

The subject-matter being clearly within our jurisdiction, and having possession of the record, we see no objection to an examination of the case. This court held in Gelston *v.* Hoyt, 3 Wheat. 246, under the twenty-fifth section of the Judiciary Act of 1789, giving appellate jurisdiction to this court from the final judgment of the highest State court, "the writ of error may be directed to any court in which the record and judgment on which it is to act may be found, and if the record has been remitted by the highest court and to another court of the State, it may be brought by the writ of error from that court." In principle, that case is analogous to the one under consideration. If the record contain the judgment duly certified, over which we can exercise jurisdiction, it is not essential that it should be certified by the court rendering the judgment.

The questions in the case arise on exceptions taken to the rulings of the court at the trial.

To sustain the plaintiff's title, two judgments and executions thereon, with the sheriff's return, were offered in evidence. The first in behalf of Edward Johnston *v.* "The Owners of Half-breed Lands lying in Lee County," Iowa Territory, for twelve hundred and ninety dollars, at August term, 1839; the other in behalf of David Brigham *v.* the same defendants, for the sum of eight hundred and eighteen dollars, at the same term. Executions having been issued on these judgments, the sheriff returned on both of them that he had levied "on the Half-breed Sac and Fox reservation in Lee County, Iowa Territory, commonly called the Half-breed tract"; and had advertised and sold the same for the sum of twenty-eight hundred and eighty-four dollars, sixty-six cents.

In pursuance of this sale, the sheriff made to Hugh T. Reid, the purchaser, a deed for the lands levied on, containing one hundred and nineteen thousand acres, more or less.

The above proceeding took place under a law of the territorial legislature of Iowa, passed the 25th of January, 1839. By the first section of that law, "An Act for the partition of the

Half-breed lands, and for other purposes," and an act supplementary thereto, were repealed. The preamble to the repealed act expresses its object, — "Whereas it is expedient, in order to the settlement of that tract of land lying between the Mississippi and Des Moines Rivers, commonly called the Half-breed lands, which was reserved for the Half-breeds of the Sac and Fox tribes of Indians, by treaty made at Washington city, between the United States and those tribes, on the 4th of August, 1824, which was released to said Half-breeds, with power to convey their rights, &c., by act of Congress, approved the 30th of June, 1834, that the validity of the titles of the complainants should be determined, and partition of said lands among those having claims should be made, or a sale thereof for the benefit of such valid claimants."

The second section of the repealing act provided, that the several commissioners by and under the act repealed, who were authorized to sit and take testimony, &c. under said act, "may immediately, or as soon as convenient, commence actions before the District Court of Lee County, for their several accounts against the owners of the said 'Half-breed lands'; and give eight weeks' notice in the Iowa Territorial Gazette to said owners of such lands; and the judge of said District Court, upon the trial of said suits before it at its next term, shall, if said accounts are deemed correct, order judgment for the amount and costs to be entered up against said owners, and said judgment shall be a lien on said lands," &c.

The third section declares, "The words 'Owners of the Half-breed Lands lying in Lee County,' shall be a sufficient designation and specification of the defendants in said suits."

By the fifth section it was provided, that "the trial of said suits shall be before the court, and not a jury; and this act shall receive a liberal construction, such as will carry out the spirit and intention thereof."

The deed from the sheriff to Reid, and also the judgment and executions on which it was founded, having been given in evidence, though objected to by Webster, he offered to prove to the jury that the judgments, executions, sheriff's sale, and sheriff's deed were all procured by fraud of the plaintiff, and others, and that the whole title of the plaintiff was founded upon fraud and fiction; to which the plaintiff objected, and the court refused to admit the evidence.

The defendant then offered evidence conducing to prove, that Na-ma-tau-pas, under whom he claimed the land, was a Half-breed of the Sac Indians, accompanied by a deed from him for the premises in controversy, to John Bond, dated the 3d of March, 1837; and also a deed from Bond to Theophilus Bul-

lard for the same land, dated the 20th of March in the same year; and also a deed from Bullard to Webster for the same land, dated the 7th of April, 1838; all of which deeds were duly acknowledged; but the plaintiff objected to said deeds being admitted as evidence, and the court sustained the objection.

The defendant then offered to prove that he entered into the possession of the premises, which were improved, and that he had occupied them up to the time of the trial. And he then offered to prove by parol testimony, that no service had ever been made upon any person in the suits in which the judgments were rendered, under which the sale was made; that no notice was given by publication of the institution of said suits; that the plaintiff was the counsel that procured said judgments; that said judgments were rendered upon a fictitious demand, never proved before the auditor; that Webster and the owners of the Half-breed tract of land, or some of them, were prevented from appearing and defending by the fraudulent representations of said plaintiff; that the sale was in fact never made by the sheriff, Taylor; that his returns were fraudulent and false; which evidence, being objected to, was overruled by the court.

Other exceptions were taken, but it is deemed unnecessary to refer to them.

This was an extraordinary procedure from its commencement. With the view to produce a settlement of the large tract of land owned by the Half-breed Indians in the county of Lee, to settle the claims to those lands, partition them among the claimants, or make a sale thereof for the benefit of such claimants, the act of the 16th of January, 1838, containing twenty-four sections, was passed. Thomas S. Wilson, David Brigham, and Edward Johnston were appointed commissioners, who were vested with certain powers to carry out the objects of the act, and who were to receive each six dollars per day for their services. The judgments on which the land was sold were obtained by two of the commissioners, for services rendered under the above act. To satisfy these two claims, the entire tract of the Half-breeds was sold, containing 119,000 acres.

By the act under which the suits were instituted, no other designation of the defendants was required than "Owners of the Half-breed Lands lying in Lee County." These suits were not a proceeding *in rem* against the land, but were *in personam* against the owners of it. Whether they all resided within the Territory or not does not appear, nor is it a matter of any importance. No person is required to answer in a suit on

whom process has not been served, or whose property has not been attached. In this case there was no personal notice, nor an attachment or other proceeding against the land, until after the judgments. The judgments, therefore, are nullities, and did not authorize the executions on which the land was sold.

By the seventh article of the amendments of the Constitution it is declared, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The organic law of the Territory of Iowa, by express provision and by reference, extended the laws of the United States, including the Ordinance of 1787, over the Territory, so far as they are applicable.

The act under which the above proceeding was had prohibited the trial by jury in matters of fact on which the suits were founded. In this respect the act was void.

The District Court erred in overruling the evidence offered by the defendant, to prove fraud in the judgments, executions, sheriff's sale, and sheriff's deed.

When a judgment is brought collaterally before the court as evidence, it may be shown to be void upon its face by a want of notice to the person against whom judgment was entered, or for fraud.

The District Court also erred in overruling the evidence of title offered by the defendant. The deeds upon their face appeared to have been duly executed; and there was no suggestion that they did not relate to the land in controversy. If no partition had been made, so that Na-ma-tau-pas could not give an exclusive title to the land, yet, being proved to be a Half-breed, he had the power to convey at least his interest in the land, which gave a right of possession to some extent to Webster. The deeds showed that he was not a trespasser, and had a right to defend his possession. The extent of his right of possession under his deed it is not necessary now to determine.

There was also error in the District Court, in overruling the evidence offered by the defendant to show that no notice was given by publication, as the act requires. If jurisdiction could be exercised under the act, it was essential to show that all its requisites had been substantially observed. It was necessary for the plaintiff to prove notice, and negative proof that the notice was not given, under such circumstances, could not be rejected.

For the above reasons, the judgment of the Supreme Court of the Territory, affirming the judgment of the District Court, is reversed.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the Territory, now State, of Iowa, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed, with costs, and that a statement of this decision be certified to the Supreme Court of Iowa.

WILLIAM H. VAN BUREN, PLAINTIFF IN ERROR, *v.* WILLIAM H. DIGGES, USE OF JOSEPH LITBEY.

Where a contractor engaged to build a house for a certain sum of money, and the owner of the house, when sued, offered to prove that there were various omissions in the work stipulated to be done, and portions of the work were done in a defective manner, not being as well done as contracted for, and filed a bill of particulars of these omissions and defects by way of set-off, this evidence was admissible.

The old rule, that, where a party shall have been injured, either by a partial failure of consideration for the contract, or by the non-fulfilment of the contract, or by breach of warranty, he must be driven to a cross action, has been much relaxed in later times. The case of Withers *v.* Greene (9 Howard, 213) referred to and reaffirmed.

Where the contract provided that, if the house were not finished by a certain day, a deduction of ten per cent. from the price should be made, and the defendant offered evidence to prove that this forfeiture was intended by the parties as liquidated damages, the evidence was properly rejected. It would have been irregular in the court to go out of the terms of the contract. Unless the forfeiture had been expressly adopted by the parties as the measure of injury or compensation, it would have been irregular to receive the evidence where the inquiry was into the essential justice and fairness of the acts of the parties.

Where the defendant offered to prove that certain work which he, the defendant, had caused to be done by a third person, was usual and proper, and necessary to the completion of the house, this evidence was properly rejected. He should have proved that it came within the contract. So, also, evidence was inadmissible that the defendant, in presence of the plaintiff, insisted upon its being within the contract; for this would have been making the defendant the judge in his own case.

Mere acquiescence by the contractor in the defendant's causing certain work to be done by a third person, will not exclude the contractor from the benefit of having further time allowed to finish the house. It was not necessary for him to make a special agreement that further time should be allowed, in consequence of the delay caused by this extra work.

THIS case was brought up, by writ of error, from the Circuit Court of the United States, sitting for the County of Washington, in the District of Columbia.

On the 7th of August, 1844, William H. Digges and William H. Van Buren entered into a contract in the city of Washington, as follows: —

"It is hereby agreed, between William Digges, of the city

of Washington, carpenter, of the one part, and W. H. Van Buren, M. D., of the other part, as follows:—

"First. The said William Digges agrees to build, or cause to be built, for the said W. H. Van Buren, a house, with office, back buildings, woodhouse, stable, and privies, in the style and of the materials set forth in the following specifications, and represented in the accompanying plan, to wit:—

(Then followed numerous specifications.)

"Second. That the said W. H. Van Buren is to pay to said William Digges for the house built and finished as above specified, the sum of $4,600 in gold or silver current money of the United States, or its equivalent in bank-notes, in the following manner; viz. $1,000 on the 1st day of September, $1,000 on the 1st of October, $1,000 on the 1st of November, and $1,600 on the day that the house is entirely finished and fit to occupy; provided that it shall not be later than the 25th of December, 1844; he, William Digges, to forfeit ten per cent. on the whole amount if said house is not entirely completed and fit to occupy at the time agreed upon, viz. December 25th, 1844.

"If there should be any matters of detail or finish, or matters not specified properly, and usually attached to or necessary to the completion of a house such as the one above specified, such things are to be considered as included in this agreement.

"If any disagreement should occur between the parties in this agreement with regard to matters above specified, such disagreement shall be settled finally and without appeal, by three persons, one of whom to be selected by each of the parties, and the third chosen by the persons thus selected, and, if necessary, by lot.

"In witness whereof, the said parties have hereunto set their hands and seals this 7th day of August, in the year of our Lord 1844.

"W. H. Digges,
Wm. H. Van Buren.

"Signed and sealed in presence of—
Th. Lawson,
T. P. Andrews."

An additional Agreement.

"The undersigned hereby agree to the alterations of, and additions to, the above contract mentioned below; and also that this additional agreement shall in no respect invalidate the above contract, except in the specifications herein contained, to wit: that in place of 'the attic story with rooms,'

&c., as specified in the above contract, W. H. Digges is to build a third story, divided and finished in all respects like the second story, as specified above, except that the ceiling shall have nine feet pitch in the clear, and that there shall be a window on the stairway in the back wall, and a window on the gable end of the main building on the passage, each of the same size as the other windows of the story, and all to be double hung; and also a garret, floored, plastered, and divided as agreed upon, with the necessary stairways, in the best manner, and with the same material employed in the second story. The passage in the garret to have a semicircular window, with a base of equal width with the windows of third story, and made to slide into a frame in the wall, and each garret room to have a window on the east gable, except the small room on the passage, which is to be fitted up as a closet, with shelves and drawers, as specified for the corresponding room in the 'attic story' of the original agreement.

"And also, that for the third story and garrets as herein specified, W. H. Van Buren is to pay to W. H. Digges the sum of $ 525, when they shall be completed, in addition to all other payments already provided for. 'Pitch of second story to be reduced to eleven feet in the clear.'

"Signed this 1st day of September, 1844.

"Wm. H. Van Buren,
W. H. Digges."

On the 26th of June, 1845, Digges filed an account with the clerk of the Circuit Court, under the act of Congress passed on the 2d of March, 1833 (4 Stat. at Large, 659), entitled "An Act to secure to mechanics and others payment for labor done and materials furnished in the erection of buildings in the District of Columbia"; and claimed the lien given by that act. The account was as follows:—

Account.

Dr. William H. Van Buren to William H. Digges. — Dr.

1845, April 21.

To the price of the contract for building, &c., on lots 11 and 12, in square 169, ...	$ 4,600.00
To the addition thereto, and alteration in the plan thereof, as per agreement of 1st September, 1844, .	525.00
To additional extra work required by you to be done on said building, not specified in said contract, or the additional agreement aforesaid, viz.:—	
Paid bricklayers for extra work, ...	101.71
Removing fence, ...	7.00

Grading the yard,	12.00
Window in the gable end of main house,	25.00
Two closets in the office,	14.00
Two do. dining-room,	15.00
Snow breakers on the roof,	6.00
Cutting three holes in parlor floor for furnace,	1.50
Cutting ⌒ window in gable end,	2.50
Fixing sliding door in closet between dining-room and kitchen,	20.00
Shelf connecting cases in the office,	6.50
To extra additional size of closet in office,	6.50
To two course brick additional height of third story,	11.50
To plastering the additional height,	3.64
To extra width of three frames back of the house,	21.00
	$ 5,376.85

On the 31st of January, 1846, Digges sued out a *scire facias*, on which the marshal returned made known. The defendant then put in a plea of non-assumpsit, and the case went on regularly in that form, no declaration having ever been filed, but it was agreed that a declaration should be considered as if embraced by the record.

In April, 1847, the following notice of set-off was filed:—

"Wm. H. Digges *v.* W. H. Van Buren. — *Notice of Set-off.*

"Take notice that the above-named defendant, on the trial of this cause, will give in evidence, and insist, that the above plaintiff, before and at the trial of the commencement of this suit, was and still is indebted to the said defendant in the sum of seven hundred and seven dollars for divers materials and other necessary things made, done, furnished, used, and applied in and about a certain building that the plaintiff had undertaken and contracted to build for the defendant, at the county of Washington, in the District of Columbia, and which said materials and things were so used, applied, done, and finished on account of, and in behalf of, at the special instance and request of, the plaintiff; and also in the sum of seven hundred and seven dollars for money by the defendant before that time paid, laid out, and expended for the plaintiff by the defendant, on account of and on the behalf of the said plaintiff, under his contract as aforesaid, and by his special instance and request; and that the said defendant will set off and allow to the said plaintiff on the said trial so much of the said several sums of seven hundred and seven dollars, so due and owing from the said plaintiff to the said defendant, against any demand of the

said plaintiff, to be proved on the said trial, as will be sufficient to satisfy and discharge such demand, according to the form of the statute in such case made and provided.

"Dated this day of April, 1847.

"H. May, *Defendant's Attorney.*

"To Wm. H. Digges, Present."

"Memo. — A particular account of the above set-off is hereto annexed. H. May, *Defendant's Attorney.*

Wm. H. Digges to W. H. Van Buren, Dr., to amounts paid.

1844.		
Nov. 5.	Charles E. Craig, for painting and pencilling front of house,	$40.00
Dec. 23.	R. J. & W. Brown for cornicing parlors and vestibule, and centre-pieces with hooks, &c.	75.90
Dec. 24.	Do., for plastering house,	30.00
1845.		
Jan. 4.	P. L. Coltman, for paving, &c.,	109.85
Feb. 5.	Thomas Curtes, for bricks and digging, &c.,	40.00
"	R. O. Knowles, for fencing walls, &c.,	44.55
Mar. 10.	Thos. Curtes, for digging and curbing, &c.,	26.26
" 27.	Lewis H. Schneider, for hanging bells, &c.,	57.63
Apr. 3.	Thos. Curtes, for screws, gravel, bricks, &c.,	22.21
" 30.	F. H. Darnell, for painting,	15.00
May 2.	S. W. Wheeler, for shelves and repairs and jobbing,	13.25
" 3.	F. & A. Schneider, for kitchen crane, rings to manger,	4.87
" 9.	Do., for 4 night latches and putting on same,	5.50
" 10.	Taylor, for paving, repairing gate-piers, and pointing walls,	28.17
" 12.	Hughes, for sodding and work about yard,	41.50
" 27.	Hervey Emmert, to repairs to spouting,	13.87
July 2.	C. L. Coltman, for paving stable-yard,	57.98
" 2.	R. O. Knowles, for closets in chambers, and repairs,	58.75
Sept.	Bessy, for steps, &c.,	24.00
	Sundry amounts paid for repairs and jobbing,	38.75
To amount paid for rent of house occupied by defendant from 25 Dec., 1844, to 16 April, 1845,		155.16

In March, 1847, the cause came on for trial, when the jury, under the instructions given by the court, found a verdict for the plaintiff for $1,223.21, with interest from the 21st of August, 1845, and costs.

The bills of exception were as follows: —

Defendant's First Exception.

"VAN BUREN v. DIGGS, *Use of Libbey.*

"The plaintiff, in support of the issue joined upon the plea of non-assumpsit, produced and proved written contracts between the parties, as follows (copied in pp. 461—463), and further offered evidence tending to prove that he had executed the work therein stipulated for, and had delivered it to the defendant, who received it without objection. And thereupon the defendant offered to prove, by competent witnesses, that, before receiving the said work, and during the progress thereof, he had objected to the sufficiency of various parts of the same as a compliance with the contract, and had communicated said objections to the plaintiff, and that there were various omissions of work stipulated to be done, and various portions of the work contracted for were done in a defective and inferior manner, and not as well as contracted for by the plaintiff, and that some of these defects were not and could not be discovered by the defendant until after the defendant had entered into the possession and use of the house; and the defendant offered to prove, by way of set-off, and having filed a bill of particulars of said alleged omissions and defects, and given due notice thereof to the plaintiff, and of his purpose in reduction of the contract price of the whole work sued for by the plaintiff, the value of said omissions, and the difference in value between the actual work defectively executed and that contracted for; to which evidence so offered, or any of it, the plaintiff objected as inadmissible under the issue; and the court, on the objection of the plaintiff so taken, refused to admit any of said evidence for said purpose; to which refusal the defendant excepts, and tenders to the court this his bill of exceptions, which is thereupon signed and sealed, this 14th day of April, 1847.

"W. CRANCH,
JAMES S. MORSELL."

Defendant's Second Exception.

"In addition to the evidence contained in the aforegoing bills of exception on the part of defendant, and which are made a part hereof, the defendant, for the purpose of informing the court as to the relation and situation of the said defendant in regard to the said house, and the plan and building thereof, and the said plaintiff, at the time of the execution of the contract aforesaid, and the circumstances surrounding the parties, and leading and inducing to the said contract, offered evidence by T. P. Andrews, a competent witness, and who was present at the execution of said contract, and signed the

same as a witness, tending to prove that the said defendant intended to reside in the said house with his family as their permanent home; that the site of the same was selected by him on account of its great convenience to be a place of business; that the plan thereof was, in many respects, peculiar, and according to his own plan, and intended for his own convenience and professional habits; and that the amount of ten per cent. on the contract price, stipulated by the contract aforesaid to be forfeited if the said house was not entirely finished and fit to occupy, as therein provided, on the 25th of December, 1844, was intended by the said parties, at the time of entering into said contract, as and for the liquidated damages that would result and fairly belong to the said defendant by reason of said failure to finish the said house on the 25th of December, 1844; to which said offered evidence, and every part thereof, the plaintiff objected, and the court refused to hear the same; to which refusal of the court the defendant, by his counsel, excepts, and prays the court to sign, seal, and enroll this his bill of exception, which is accordingly done, this 15th day of April, 1847.

W. CRANCH,
JAMES S. MORSELL,
JAMES DUNLOP."

Defendant's Third Exception.

"Upon the further trial of this cause, and in addition to the evidence contained in the aforegoing bills of exceptions, the plaintiff having given evidence tending to show that the said defendant, while the said house was being built, made a contract for an alteration in the style and finish of the plastering of the said house, which contract was made with a third person, and not with the plaintiff, and thereby the execution of the work on the said building was delayed beyond the said 25th of December, 1844; the defendant offered evidence tending to prove that the said plastering, and the style and finish thereof, was usual and proper and necessary to the completion of the said house; and further offered to prove, that at the time of the execution of the said plastering the defendant, in the presence of the plaintiff, insisted on and required him to execute the same as a part of his contract, and that he refused so to do. To the admissibility of which said offered evidence, and every part of it, the plaintiff objected, and the court refused to permit the same or any part thereof to go to the jury; to which refusal the defendant excepts, and prays the court to sign, seal, and enroll this his exception, which is accordingly done, this 15th day of April, 1847.

W. CRANCH,
JAS. S. MORSELL."

Defendant's Fourth Exception.

"On the further trial of this cause, and after the evidence contained in the foregoing bills of exceptions, and which are made a part hereof, the defendant offered evidence tending to prove that he had paid, laid out, and expended various sums of money to various persons other than the plaintiff, for and on account of the omissions and deficiencies in the work and materials done and furnished by the plaintiff, and omitted to be done and furnished by him under his said contract; and offered to prove, in connection therewith, that such omissions and deficiencies were in and about the work and materials furnished and done by the plaintiff under his said contract; but the said plaintiff objected to the admissibility of the said offered evidence, and every part thereof, and the court refused to allow the same, or any part thereof, to go to the jury; to which refusal of the court the defendant excepts, and prays the court to sign, seal, and enroll this his exception, which is accordingly done, this 15th day of April, 1847.

W. CRANCH,
JAS. S. MORSELL."

Defendant's Fifth Exception.

"Upon the further trial of this cause, the plaintiff having given evidence in addition to that contained in the aforegoing bills of exceptions, and which are made a part hereof, tending to prove that he had, at the request of defendant, in addition to the work and labor and materials provided for in the said contract, done and performed certain extra work, and furnished extra materials on and about the said house and premises, and for which he claimed extra compensation and damages over and above the amount specified in the said contract, and the defendant, having offered evidence tending to prove that he did not consent to any extension of the time for completing the said house as provided by the said contract, prayed the court to instruct the jury, that if, from the whole evidence aforesaid, the jury shall believe that any extra work ordered or sanctioned by defendant beyond that provided for by the written agreements did not entitle the plaintiff to any extension of time in the completion of said work, unless the jury shall find that at the time of agreeing for said work it was distinctly understood that extra time should be allowed in consequence, and then only to the extent of the time actually agreed upon, or in the absence of any agreement for a precise time, to such extent as was reasonably necessary for such extra work; which instruction the court gives, and on the prayer of the plaintiff adds thereto: But the court further instructs the jury, that the de-

fendant is not entitled to set off in this action the sum of ten per cent. on the amount of the contract mentioned in the proviso in the said contract, nor any damages which may have resulted to the defendant by any delay on the part of the plaintiff in completing the said house, and delivering the same to the defendant on the said 25th of December, 1844. To which modification of the court and instruction on the part of the plaintiff, as above granted, the defendant excepts, and prays the court to sign, seal, and enroll this his bill of exceptions, which is accordingly done, this 15th day of April, 1847.

W. CRANCH,
JAS. DUNLOP."

Defendant's Sixth Exception.

"And the said plaintiff, having further given evidence tending to show that, after the plastering of the said house had been begun, the defendant entered into a contract with the plasterer to make cornice and centre-pieces for the parlors and passage, that a delay in the work for a week was occasioned by the negotiation leading to the said agreement, and a further delay of two weeks was occasioned by the work required on the said additional plastering, and part of the same being frozen insomuch that the said plasterer did not and could not finish the said work until some days after the said 25th of December, 1844, and much of the carpenters' work and the painters' was thereby postponed and delayed until after the said day; the said defendant then gave evidence to show that the plaintiff knew of the said agreement for the said additional plastering, and did not object thereto.

"And thereupon the defendant prayed the court to instruct the jury: If the jury shall find, from the evidence, that any delay was caused in completing the work in consequence of the extra plastering in the parlors and passage, done under the distinct contract between the defendant and Messrs. Brown, given in evidence, and they shall further find that said extra plastering was so done with the full knowledge and sanction of the plaintiff, and without any understanding between him and the defendant at the time, that in consequence thereof a further time should be allowed for completing the building, then the plaintiff is not entitled to any further time for completing the building because of such work and the delay attending the same.

"That the forfeiture of ten per cent. in the contract price of the work for a failure to complete the same by the 25th of December, as stipulated in the written contract given in evidence, is to be held as the liquidated amount of damage for the failure

to complete the work in that time, and the defendant is entitled to a deduction of the full amount thereof from the specified price of the work, unless the jury shall find that the failure to complete the same by said date proceeded wholly from the acts or default of the defendant, so that, independently of such acts or default, he would have so completed it within said time.

"Which instructions, and each of them, the court refused to give; to which refusal of the court the defendant excepts, and prays the court to sign and seal this his bill of exceptions; which is done accordingly, this 15th of April, 1847.

W. CRANCH,
JAMES S. MORSELL,
JAMES DUNLOP."

Defendant's Seventh Exception.

"If the jury shall find, from the evidence aforesaid, that the plaintiff contracted with the defendant, in writing, to build, complete, and deliver the said house to him on or before the 25th of December, 1844, and that the plaintiff failed so to do, and shall further find that the time for said completion and delivery was not extended beyond the said 25th of December, 1844, by the agreement of the said plaintiff and defendant, or by the act of the defendant, then the plaintiff is not entitled to recover in this action.

"Which the court refused to give; to which refusal the defendant prays leave to except, and that the court will sign and seal this his bill of exceptions; which is accordingly done, this 15th of April, 1847.

W. CRANCH,
JAMES S. MORSELL."

Defendant's Eighth Exception.

"If the jury find, from the evidence aforesaid, that the plaintiff contracted, by the contract of the day of aforesaid, and the additional agreement thereto of the day as aforesaid, to build, complete, and deliver to the defendant the said house on or before the 25th of December, 1844, and that the plaintiff failed so to do, then the defendant is entitled to claim ten per cent. as a deduction on the whole amount of the contract price from the claim of the plaintiff; provided the jury shall find, from the evidence, that the plaintiff could reasonably have so completed and delivered the said house on the 25th of December aforesaid, and notwithstanding the jury may further find that the building and completion thereof were delayed by the act of the defendant.

"Which instruction the court refused to give; to which re-

fusal the defendant excepts, and this his bill of exceptions is signed, sealed, and ordered to be enrolled, this 15th of April, 1847.

W. CRANCH,
JAMES S. MORSELL,
JAMES DUNLOP."

Defendant's Ninth Exception.

"If the jury find, from the evidence, that the plaintiff contracted with the defendant to build, complete, and deliver to him the said house on the 25th of December, 1844, and failed so to do, then the defendant is entitled to claim ten per cent. on the amount of the whole price of the contract, as a deduction from the plaintiff's claim.

"If the jury shall find, from the evidence, that the plaintiff contracted with the defendant, in writing, to build, complete, finish, and deliver to him the said house on or before the said 25th of December, 1844, and shall further find that the said plaintiff failed so to do, and that the time for said completion and delivery was not extended by agreement of the parties beyond the said 25th of December, 1844, then the plaintiff is not entitled to recover in this action.

"Which instruction the court refused to give. Whereupon the defendant, by his counsel, excepted to said refusal, and prayed the court here to sign and seal this his bill of exceptions; which is accordingly done, this 15th of April, 1847.

W. CRANCH,
JAMES S. MORSELL,
JAMES DUNLOP."

Upon these exceptions, the case came up to this court.

It was argued by *Mr. May*, for the plaintiff in error, and *Mr. Bradley*, for the defendant in error.

Mr. May, for the plaintiff in error, contended that the Circuit Court had erred.

The principle asserted in the first, fourth, and fifth exceptions is understood to be,—

That in an action to recover the stipulated price on a special contract (to build a house, where the house, when built, has been accepted), evidence cannot be offered to show a partial failure to perform the same, according to its terms. Neither can money paid to a stranger to complete the same or on account of said failure, nor any evidence of damages suffered by reason of such failure, be offered to reduce the said price, even though the same be specially pleaded, or notice by way of set-off, with a particular account thereof, be filed in the case.

Against this principle the following authorities will be relied on. Act of Assembly of Maryland of 1785, ch. 46, § 7; Evans's Maryland Practice, 153; 2 Evans's Harris, 37; 2 Greenleaf's Evidence, § 136, and cases there cited; Basten *v.* Butter, 7 East, 482; Poulton *v.* Lattimore, 9 Barn. & Cress. 263; Runyan *v.* Nichols, 11 Johns. 547; Withers *v.* Greene, 9 Howard, 213.

The second exception denies that it is the duty of the court to hear evidence to aid its exposition of a doubtful intention appearing in a written instrument, so as to give it effect according to the real intentions of the parties.

Against this will be cited, 1 Greenleaf's Evidence, § 277; Gray *v.* Harper, 1 Story, 574; Smith *v.* Bell, 6 Peters, 75; Bradley *v.* Steamboat Co., 13 Peters, 99.

The fifth and eighth exceptions declare that the sum of ten per cent., as agreed by the said contract to be forfeit, in case the said house was not completed and delivered by the 25th of December, 1844, was intended by the parties as "a penalty," and not as "liquidated damages," and could not be set off or discounted against the plaintiff's claim.

Against this will be cited, 2 Pothier on Obligations, by Evans, note No. 12, pp. 85–98; Davies *v.* Penton, 6 Barn. & Cress. 224; Lindsay *v.* Anesley, 6 Iredell, 189; Fletcher *v.* Dyche, 2 Term Rep. 32; Huband *v.* Grattan, 1 Alcock & Napier, 394; Crisdee *v.* Bolton, 3 Carr. & Payne, 240; Leighton *v.* Wales, 3 Meeson & Welsby, 545; Nobles *v.* Bates, 7 Cowen, 309; Dakin *v.* Williams, 17 Wendell, 454; Allen *v.* Brazier, 2 Bailey, (S. C.) 295; Brewster *v.* Edgarly, 13 N. Hamp. 277; Mead *v.* Wheeler, Ibid. 354.

Mr. Bradley, for the defendant in error, referred to the following authorities:—

On the first point, 12 Wheaton, 183, 189, 193.

Second point, 13 Peters, 99.

Third point, 7 Wheaton, 13, 16, 17, 18.

Mr. Justice DANIEL delivered the opinion of the court.

The defendant in error, in a form of proceeding practised in the court of Washington, instituted a suit in the nature of an action of assumpsit against the plaintiff, upon a contract in writing for building a house. The contract between these parties, which is drawn out in much minuteness of detail, it is not deemed necessary to set forth here *in extenso* in order to a correct understanding of the questions of law raised upon this record. Enough for that purpose will be shown in the following extracts from the agreement above mentioned.

After giving the dimensions of the house to be built, the con-

tract proceeds with these stipulations concerning the work to be done, and the compensation to be paid therefor: —

"House to be built of two stories, with attic chambers above, of first-rate materials throughout, including office and back buildings, and in the best and most modern style of workmanship, and to be entirely finished and fit for occupation on or before the 15th of December, 1844.

"For the brick-work throughout, the best hard-burned red brick are to be employed, with sharp river sand and best lime. For the flooring throughout, the best quality narrow North Carolina yellow heart pine, tongued, grooved, and secret nailed. Roofs to be slated in the best manner. Spouting to be thoroughly arranged, in the least conspicuous manner, so as to carry off all the water that falls on the roofs of the main building, office, and back buildings. Door and window frames and doors to be of perfectly seasoned material, warranted not to shrink."

After a long detail, having reference rather to an enumeration than to the quality of the several things to be done in completing the house and offices, the agreement concludes in these words: — "That the said William H. Van Buren is to pay to the said William Digges for the house built and finished as above specified, the sum of $4,600 in gold or silver current money of the United States, or its equivalent in bank-notes, in the following manner; viz. $1,000 on the 1st day of September; $1000 on the 1st day of October; $1,000 on the 1st day of November; and $1,600 on the day that the house is entirely finished and fit to occupy, provided that it shall not be later than the 25th day of December, 1844; he, the said William Digges, to forfeit ten per cent on the whole amount, if the said house is not entirely completed and fit to occupy at the time agreed upon, viz. December 25th, 1844."

Subsequently, viz. on the 1st day of September, 1844, the above agreement was altered by the parties in the following particulars, viz. "that in place of the attic story with rooms, as specified in the above contract, William H. Digges is to build a third story, divided and finished in all respects like the second story"; and after reciting some directions with respect to divisions and arrangements in this third story, the new agreement provides for the "finishing of a garret; to be floored, plastered, and divided as agreed upon, with the necessary stairways, in the best manner and with the same materials employed in the second story."

For the work to be performed under this new agreement, when it should be completed, the plaintiff in error was to pay the additional sum of $525; but no stipulation appears there-

in as to the time within which this additional work was to be completed.

The plaintiff in error, the defendant below, pleaded the general issue (*non assumpsit*), filed a bill of particulars amounting to the sum of $ 707, for moneys paid, expenses incurred, and damage sustained, by reason of the non-performance by the plaintiff of his agreement; and filed also with this bill of particulars a notice in writing, in which the amount of that bill was claimed in diminution of the plaintiff's demand. Upon the issue joined, the jury rendered a verdict for the plaintiff, for the sum of $ 1,223.21, with interest from the 21st day of August, 1845, till payment, and for this sum, with the costs of suit, the court gave judgment against the defendant below.

At the trial of this cause, there were nine separate prayers to the court, and nine bills of exceptions sealed to the rulings of the court upon the prayers thus presented to them. Some of these exceptions it will be unnecessary particularly to discuss, as they are clearly embraced, if not within the terms, certainly within the meaning, of others which were taken. We will therefore examine those exceptions only which are regarded as propounding in themselves some distinct and separate legal principle.

The first exception by the defendant below, the plaintiff in error here, is as follows: —

"The plaintiff, in support of the issue joined upon the plea of *non assumpsit*, produced and proved written contracts between the parties, as follows (copied in pages 461 – 463), and further offered evidence tending to prove that he had executed the work therein stipulated for, and had delivered it to the defendant, who received it without objection. And thereupon the defendant offered to prove, by competent witnesses, that, before receiving said work, and during the progress thereof, he had objected to the sufficiency of various parts of the same as a compliance with the contract, and had communicated said objections to the plaintiff, and that there were various omissions of work stipulated to be done, and various portions of the work contracted for were done in a defective and inferior manner, and not as well as contracted for by the plaintiff, and that some of these defects were not and could not be discovered by the defendant, until after the defendant had entered into the possession and use of the house; and the defendant offered to prove, by way of set-off, and having filed a bill of particulars of said alleged omissions and defects, and given due notice thereof to the plaintiff, and of his purpose in reduction of the contract price of the whole work sued for by the said plaintiff, the value of said omissions, and the difference in value between

the actual work defectively executed, and that contracted for; to which evidence so offered, or any of it, the plaintiff objected, as inadmissible under the issue, and the court, on the objection so taken, refused to admit any of said evidence for said purpose."

The decision of the Circuit Court, rejecting the evidence described and tendered for the purposes set forth in this exception, cannot be sustained upon any sound legal principle.

We are aware of the rule laid down in the earlier English cases, which prescribed that in all instances wherein a party shall have been injured, either by a partial failure of consideration for the contract, or by the non-fulfilment of the contract, or by breach of warranty, the person so injured could not in an action against him upon the contract defend himself by alleging and proving these facts; but could obtain redress only by a cross action against the party from whom the injury shall have proceeded. This doctrine of the earlier cases has been essentially modified by later decisions, and brought by them to the test of justice and convenience, which requires, that whenever compensation or an equivalent is claimed by a party in return for the performance of conditions for which such compensation or equivalent has been stipulated, the person so claiming is bound to show a fulfilment in good faith of those conditions; and the party against whom the claim shall be made shall be permitted to repel it by proof of an entire failure to perform, or of an imperfect or unfaithful performance; or by proof of injurious consequences resulting from either of these delinquencies; and shall not be driven exclusively to his cross action. Of this doctrine the following examples, amongst others to be found, may be adduced from the English courts.

Per Parke, Justice, in the case of Thornton *v.* Place, 1 Moody & Robinson, 219, it is said: "When a party engages to do certain work on certain specified terms, and in a specified manner, but in fact does not perform the work so as to correspond with the specification, he is not of course entitled to recover the price agreed upon in the specification; nor can he recover according to the actual value of the work, as if there had been no special contract. What the plaintiff is entitled to recover is the price agreed upon, subject to a deduction, and the measure of that deduction is, the sum which it would take to alter the work so as to make it correspond with the specification."

In Chapel *v.* Hicks, 2 Carrington & Marshman, 214, it is said: "In an action on a special contract for work done under the contract, and for work and materials generally, the defendant may give in evidence that the work has been done im-

properly, and not agreeably to the contract; in that case, the plaintiff will only be entitled to recover the real value of the work done and materials supplied."

In the case of Cutler *v.* Close, 5 Car. & Payne, 337, where a party had contracted to supply and erect a warm-air apparatus for a certain sum, it was ruled, in an action for the price (the defence to which was, that the apparatus did not answer), that, if the jury thought it was substantial in the main, though not quite so complete as it might be under the contract, and could be made good at a reasonable rate, the proper course would be to find a verdict for the plaintiff, deducting such sums as would enable the defendant to do what was requisite. And Tindal, C. J., in his instructions to the jury, uses this language: "The plaintiffs say that they have performed their contract, and are entitled to be paid. On the contrary, the defendant says that the apparatus is not at all of the sort he contracted for; and therefore he is not liable to pay for it. The law on the subject, as it seems to me, lies in a narrow compass. If the stove in question is altogether incompetent, and unfit for the purpose, and either from that, or from the situation in which it is placed, does not at all answer the end for which it was intended, then the defendant is not bound to pay. If it is perfect, and the fault lies in management at the chapel, then the plaintiffs will be entitled to recover the whole price. But there is another view of the case. The apparatus may be in the main substantial, but not quite so complete as it might be according to the contract; and in that case, if it can be made good at a reasonable expense, the proper course will be, to give your verdict for the plaintiffs, deducting such sum as will enable the defendant to do that which is requisite to make it complete."

But, as conclusive with this court upon this point, it may be remarked, that it was carefully considered at the last term in the case of Withers *v.* Greene, 9 Howard, 213; the decisions applicable thereto from the courts both in England and the United States were then collated and examined, and upon that examination the doctrine herein above propounded received the concurrence of all the judges. Again expressing our approbation of this doctrine, we conclude that the proof tendered, as declared in the first exception of the defendant below, should have been admitted, and that the Circuit Court erred in ruling its exclusion from the jury.

The second exception by the defendant states, that, in addition to the evidence previously tendered by him, he offered proof tending to show the peculiar adaptation of the house contracted for, both in its design and situation, to the defendant's personal and professional pursuits and convenience, and

that the amount of ten per centum on the contract price stipulated to be forfeited if the house was not entirely finished and ready for occupation, as therein provided, on the 25th of December, 1844, was intended by the parties as and for liquidated damages, that would result and fairly belong to the said defendant by reason of said failure to finish the said house on the 25th of December, 1844; and that the court refused to hear the evidence thus tendered. In the refusal of the court to admit the evidence thus tendered we think they decided correctly. It would have been irregular in the court to go out of the terms of the contract, and into the consideration of matters wholly extraneous, and with nothing upon the face of the writing pointing to such matters as proper or necessary to obtain its construction or meaning. The clause of the contract providing for the forfeiture of ten per centum on the amount of the contract price, upon a failure to complete the work by a given day, cannot properly be regarded as an agreement or settlement of liquidated damages. The term forfeiture imports a penalty; it has no necessary or natural connection with the measure or degree of injury which may result from a breach of contract, or from an imperfect performance. It implies an absolute infliction, regardless of the nature and extent of the causes by which it is superinduced. Unless, therefore, it shall have been expressly adopted and declared by the parties to be a measure of injury or compensation, it is never taken as such by courts of justice, who leave it to be enforced where this can be done in its real character, viz. that of a penalty. In a defence like that attempted by the defendant in the Circuit Court, upon the essential justice and fairness of the acts of the parties, a positive immutable penalty could hardly be applied as a fair test of their merits.

In the third exception by the defendant, it is stated that the plaintiff, having given evidence to show that the defendant, whilst the house in question was being built, made a contract for an alteration in the style and finish of the plastering of the house, with a third person, and not with the plaintiff; and thereby the execution of the work on the said building was delayed beyond the 25th of December, 1844; the defendant offered evidence tending to prove that the said plastering and the style and finish thereof were usual and proper and necessary to the completion of the said house; and further offered to prove, that, at the time of the execution of the said plastering, the defendant in the presence of the plaintiff insisted on and required him to execute the same as a part of his contract; and that he refused so to do, and that to the admissibility of this evidence, objection being made, it was excluded

from the jury by the court. In this decision the court were certainly correct. The defendant could have no right to insist upon the performance of plastering, or of any other description of work, unless it came within the provisions of the contract; the simple fact that the work demanded was suitable to the style of the defendant's house, could give him no right to demand its execution, unless the plaintiff had contracted for its performance. It was incumbent, therefore, on the defendant, to prove by legal evidence that the work demanded by him was within the provisions of the contract; but instead of doing this, he insisted upon showing merely that he, the defendant, had determined this work to be proper and within the provisions of the contract, and that the plaintiff's non-concurrence in this determination, and consequent refusal to do what the defendant required, were to be received as proof of a failure on the part of the plaintiff to perform his contract; and as forming a just ground with the defendant for his resistance to the action. It would indeed have been strange, if the court could have tolerated such an irregularity as this; by which the defendant would have been permitted to become a witness in his own behalf.

The fourth and fifth exceptions on the part of the defendant below, relating merely to the admissibility of testimony to show a failure to perform, or an incomplete performance, on the part of the plaintiff, are embraced within the first exception already considered, and the rulings of the court as to these two last instances being in contravention of our opinion as declared upon the first exception, are pronounced by this court to be erroneous.

In the sixth exception of the defendant, two subjects essentially distinct in character are blended. As to the first, it is stated that the plaintiff, having further given evidence tending to show that, after the plastering of the house was begun, the defendant entered into a contract with the plasterer to make cornices and centre-pieces for the parlors and passages; that a delay in the work for a week was occasioned by the negotiation leading to the said agreement; and a further delay of two weeks by the additional plastering, and part of the same being frozen, insomuch that the plasterer could not finish the work until some days after the 25th of December, 1844, and much of the carpenters' work and the painters' was thereby postponed and delayed until after the said day; and the said defendant then gave evidence to show that the plaintiff knew of the said agreement for the said additional plastering, and did not object thereto. And thereupon the defendant prayed the court to instruct the jury, that if they shall find that any delay

was caused in completing the work in consequence of the extra plastering in the parlors and passage, done under the distinct contract therefor given in evidence, and they shall further find that said extra plastering was so done with the full knowledge and sanction of the plaintiff, and without any understanding between him and the defendant at the time, that in consequence thereof a further time should be allowed for completing the building, then the plaintiff is not entitled to any further time for completing the building because of such work, and the delay attending the same.

The second subject embraced in this exception is the forfeiture of ten per centum upon the contract price of the work, which the court was asked to declare was the amount of liquidated damages, the whole amount of which on the price of the work the defendant was authorized to claim for a failure to complete the work by the 25th of December, 1844, unless the jury should find that the failure to complete the work proceeded wholly from the acts or default of the defendant. The refusal by the Circuit Court of both the instructions appearing upon this exception is entirely approved.

It is difficult to conceive, upon what ground the defendant could be permitted to interpose an obstruction to the fulfilment of the contract, and then to convert that very obstruction into a merit on his own part, or into the foundation of a claim against the party whom he had already subjected to the inevitable consequences of the obstruction so interposed; an inability to comply with his engagement, and a postponement of the fruits of a compliance therewith, if that had been permitted. Mere acquiescence in this irregularity by the plaintiff should not subject him to farther mischief. With respect to the second subject embraced in this exception, viz. the forfeiture of ten per centum claimed by the defendant, we deem it unnecessary to add to what has been already said on that subject. We will here remark, once for all, with respect to this penalty, that, as it constitutes the only ground for the eighth and ninth exceptions taken by the defendant below, those exceptions must be regarded as expressly overruled.

By the seventh exception of the defendant below, it appears that the court were asked to propound as the law, that if, from the evidence, it should appear that the plaintiff contracted with the defendant in writing, to build, complete, and deliver the said house to him on or before the 25th day of December, 1844, and that the plaintiff failed to do so; and the jury shall find that the time for said completion and delivery was not extended beyond the said 25th of December, 1844, by the agreement of the said plaintiff and defendant, or by the act of the

defendant, then the plaintiff is not entitled to recover in this action, which instruction the court refused to give.

The ruling of the court, as set forth in this exception, though not reconcilable with their own decision on the first prayer presented to them by the defendant, is in accordance with the opinion we have expressed in reference to the questions raised by that prayer, and also with the doctrine ruled by this and in other tribunals upon those questions, as in treating of that first prayer we have already shown. It places the parties upon the true ground of contestation between them, viz. the truth, the extent, and manner of performance on the one hand; the degree of injury, from omission, neglect, or imperfection of performance on the other. The ruling of the Circuit Court, therefore, upon this exception, is entirely approved; but as that court has erred in its decision in reference to the prayers in the first, fourth, and fifth exceptions of the defendant, its decision as to those prayers is hereby reversed, with costs, and this cause is remanded to the Circuit Court, with orders for a *venire facias* for a new trial in conformity with the principles expressed in this opinion.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

FREDERIC D. CONRAD, PLAINTIFF IN ERROR, *v.* DAVID GRIFFEY.

Where a witness was examined for the plaintiff, and the defendant offered in evidence declarations which he had made of a contradictory character, and then the plaintiff offered to give in evidence others, affirmatory of the first, these last affirmatory declarations were not admissible, being made at a time posterior to that at which he made the contradictory declarations given in evidence by the defendant.

Where the writ, pleadings, and contract spoke only of Frederic D. Conrad, and the judgment went against Daniel Frederic Conrad, the defendant, it was too late after verdict and judgment to assign the variation as error.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for Louisiana.

There was only one point of evidence involved. Three exceptions were taken during the progress of the trial by the plaintiff below, but, as the verdict was in his favor, they were not argued here.

On the 26th of March, Conrad, being a Louisiana planter, made a contract with Griffey of Cincinnati, by which Griffey engaged to construct and set up a steam-engine and sugar-mill boilers, &c., upon Conrad's plantation, for $ 6,650, payable at different times. Griffey stipulated to have the privilege of appointing the engineer to run the engine during the rolling of the first crop.

On the 23d of December, 1846, Griffey brought his action, by way of petition, against Conrad, claiming a balance of $ 3,781.58.

On the 22d of January, 1847, Conrad filed his answer, admitting the work, but denying that it was properly performed according to contract, and alleging that he had sustained a loss of $ 10,000, which he claimed in reconvention.

On the first trial, February 23, 1848, the jury found a verdict for plaintiff for $ 3,000, without interest.

The court granted a new trial.

On the 20th of February, 1849, the cause came on again for trial, when the jury found a verdict for plaintiff for $ 3,781.58, with interest.

Amongst other testimony taken on the part of the plaintiff, under a commission, was that of Leonard M. Nutz, the engineer sent by Griffey to erect and work the machine. His answers to various interrogatories may be condensed as follows: —

The quality and strength of the engine were well proportioned and strong. The quality of the machinery was good. The general style and character of the whole workmanship, mill and engine, was good. It compared with others very well.

By housings are meant the frame which holds or supports the rollers.

I did notice particularly the housings of Mr. Conrad's mill and engine. They were sufficiently strong; they were well fitted and suited for the purposes they were intended to be used for.

I do not know of any defects.

In answer to 14th interrogatory says, I was at the mill and engine, after it was started, in the capacity and employment of engineer. I was there on the 30th day of October, 1845, acting in that capacity.

In answer to 15th interrogatory says, On the 30th of October we put in a spring beam, underneath the housing,

and took out the ones that were there, on account of their being made of green timber and had sprung; there was nothing broke at that time; some time in November one of the housings broke, which was caused by the carelessness of one of the negroes letting a piece of iron pass in the rollers, in the carrier, which was sufficient to break any engine; I was asleep along side of the engine, and was awakened by the surge, and took out the piece of iron; the housing did not part, it only cracked, and the mill was not stopped at all on account thereof; but when the tie-bolt was put in, we stopped about 2½ hours.

In answer to 17th interrogatory says, The head engineer had an assistant furnished by the planter; the head engineer watches 18 hours, the assistant 6 hours, and they two attend to the engine.

In answer to 18th interrogatory says, I had an assistant, which was one of Mr. Conrad's slaves, named Tilman, furnished by Mr. Conrad.

In answer to 19th interrogatory says, The accident occurred during the watch of my assistant.

In answer to 20th interrogatory says, There was no time lost, except the two hours and a half which I was putting in the tie-bolt.

In answer to 21st interrogatory says, I made two new brace bolts for the housings, and continued the crop without any further detention.

In answer to 22d interrogatory says, I was present during the whole time the engine was employed taking off the crop that year, and no other stoppage of the engine and mill occurred.

This deposition was taken on the 1st of April, 1847.

The defendant then offered the depositions of Sosthene Allain, W. Hunstock, and William Neff. It may here be mentioned that the plaintiff objected to reading what related to Nutz's statements, on the ground that the defendant, by omitting to cross-examine him, and to inquire into such conversations, had not laid the foundation for the admission of such statements. But the court decided to admit them, and allowed them to be read. To this decision the plaintiff's counsel excepted. But, as before remarked, this exception was not argued.

The depositions were as follows.

Mr. Allain:—

Interrogatory 22d. Did you see and converse with the white engineer (who ran Mr. Conrad's engine), just after the last accident to the mill; if yes, do you recollect his name; what rea-

son did he assign for the housing of the mill being fractured; did you hear any thing about a piece of iron or wood running into the rollers; if yea, what and from whom?

To 22d interrogatory witness answers: That he did converse with the engineer, whose name he believes was Nutz, immediately after the breaking of the housing; and that the reason assigned by said engineer, Nutz, for the breaking of the housing was, that the housings were entirely too weak; that witness did not hear any thing said by any one about a piece of iron or wood having run into the rollers.

Mr. Hunstock:—

3d. Did the plaintiff examine the sugar-mill and engine of defendant at that time, and what did he say touching the accidents to the machinery, and their probable cause?

To the 3d interrogatory the witness answers: That the plaintiff did examine the sugar-mill and engine of defendant at that time, and then he, the plaintiff, said, that Nutz, the engineer, whom he, the plaintiff, had sent to run the engine of defendant, had told him that the breaking of the housings of the mill was owing to the chawing of the keys that keyed up the brace bolts; but he, the plaintiff, had afterwards found out that said Nutz was an incompetent and lazy engineer, and that he was inclined to believe that it was owing to Nutz's neglect the accident happened, and that he, the plaintiff, was so dissatisfied with Nutz, that soon after his return to Cincinnati he had dismissed him from his shop.

10th. Did you see Nutz soon after, and how soon after, the breaking of the housings; did he express any opinion as to the cause, and what did he say on the subject?

To the 10th interrogatory the witness answers: That he saw Nutz soon after the accident occurred, at his, witness's, sugar-house, but cannot say precisely how long after, but it was not longer than one week after the breaking of the housing, that Nutz came to the sugar-house of witness, by consent of defendant, to assist in taking down some part of his, witness's, machinery, which occupied him about one or two hours; during which time he had a conversation with Nutz about the accident which had happened to the housing of defendant's mill; that he asked Nutz to what cause the breaking of said housing was owing; and Nutz answered, he could not tell the cause of its breaking, as there was moderate feed on the cane-carrier at the time the accident happened, and no strain on the mill.

William Neff:—

The 22d interrogatory was the same as that put to Mr. Allen.

To the 22d interrogatory the witness answers: That he

heard that Nutz said, that he could not tell the reason why the housing broke; that there was a very light feed of cane on at the time, and no strain on the mill. This was said by Nutz immediately after the fracture was discovered, and he said, at the same time, that nothing had gone through the rollers that could have strained the mill.

Interrogatory 32d. Was there any unusual strain on the mill at the time the housing gave way; if yes, state what it was; did any iron or wood, or any foreign substance, go into the rollers to strain them; if yes, what was it; what did the engineer, Mr. Nutz, say about it at the time?

To 32d interrogatory witness answers: That he has no knowledge that there was any unusual strain on the mill when the housing broke, and that he does not think there was. Witness has no knowledge that any iron or wood, or any other substance than sugar-cane, went into the rollers to strain them, nor does he believe that any foreign substance did get into them to strain them. Witness heard Mr. Nutz express great surprise at the time at the accident, saying that he could not account for it, as there was a light feed of cane at the moment, and nothing had gone into the rollers to strain them. In talking on the subject of the accident, witness heard Mr. Nutz say, that the housings were entirely too weak for the power of the engine, besides the mill.

These depositions having been given in evidence, the plaintiff offered, as rebutting evidence, and to support the credit of Nutz, the two following pieces of testimony.

1st. The following letter from Nutz:—

"*New Albany, April* 3, 1846.

"Mr. D. Griffey:—Dear Sir: My sister handed me a few lines addressed to her, requesting me to send my affidavit respecting F. D. Conrad. I have no knowledge of the information you wish, unless it be the accident of the breaking of one of the housings of his sugar-mill, and all that I can say upon the subject is, that the night when, in my candid opinion, the accident happened, I was awakened by the surging of the engine; it completely stopped under a good head of steam. I then ordered the negro man who was running the engine at the time, to examine well in the cane shute, supposing something harder than cane to have passed in the carrier, and there was found a piece of iron that broke off of one of the cane carts, wedged in front of rolls, too large to pass; in the shape was thus, about 16 inches long, 1½ inches wide, where it came in contact with the other, with the rolls; and om that time until I discovered the break, which was the

next day, I found it difficult to keep that end of rolls tight; I then forged new tie-bolts with keys on the outer ends, to keep them firmly keyed, and by so doing we were enabled to take off the crop without losing but three hours by the break; for whilst I was forging the bolts, the engine was still running.

"Previous to the breaking of the housing, we had another small stoppage, but no accident; the wall was very green, and likely to give way; under the spur-wheel stand bed-plates, which rendered it firm and secure during the season, and will always remain so under any reasonable usage; this stoppage was the 30th of October, 1845.

"If the overseer, Mr. Collins, had let Mr. D. Edwards commence his work when he wanted to, I do candidly think the walls would have been more firm, and the least fear would have been overcome; there was no accident, but the bolts were placed to render the work more secure upon the foundation; and as for the machinery in general, it was a good strong piece of work, hard to be surpassed.

"LEONARD N. NUTZ.

"To DAVID GRIFFEY, *State of Indiana, Floyd County, ss.*

"On the 3d day of April, A. D. 1846, before the subscriber, justice of peace in and for the said county, and authorized by law to administer oaths, personally appeared Leonard N. Nutz, and made oath that the above is a true statement of F. D. Conrad's sugar-mill and engine.

"LEONARD N. NUTZ.

"Given under my hand and seal, this 3d day of April, 1846.

"SAMUEL G. WILSON, J. P."

2d. The testimony of one Edwards, a witness, sworn in open court, to the effect that, in the spring of 1847, the said Nutz had said, in the presence of said Edwards, that the breaking of the housings or frame of the sugar-mill had been occasioned by a piece of iron getting between the rollers.

To the introduction of this rebutting testimony the defendant objected, but the court directed it to be admitted; whereupon the defendant took the following bill of exceptions: —

"Be it known, that on the trial of this cause before the jury, the plaintiff having offered the deposition of Leonard N. Nutz in evidence, and the defendant having offered the depositions of Sosthene Allain, W. Hunstock, and William Neff, all on file, the said plaintiff offered as rebutting evidence, and to support the credit of L. N. Nutz, —

"1st. A letter of L. N. Nutz, of date New Albany, the 3d

of April, 1846, with an affidavit annexed; and 2d. The testimony of one Edwards, a witness, sworn in open court, to the effect that, in the spring of 1847, the said Nutz had said, in the presence of said Edwards, that the breaking of the housings or frame of the sugar-mill put up by plaintiff for defendant, had been occasioned by a piece of iron getting between the rollers. To both of which, to wit, the said letter and affidavit, and the said statement in presence of said Edwards, the counsel for defendant objected, that, at the time of the making of said affidavit and said verbal statements, the said Nutz was not an agent of defendant, or employed by him; that said affidavit was not made under commission, nor with any notice or opportunity on the part of defendant to cross-examine the said witness; that his said verbal statement was not made in the presence of defendant; and, lastly, that the evidence of the defendant above referred to was not an attack upon the credit of said Nutz, but was competent testimony, admissible to prove the facts attested, and did not justify the admission of statements, either verbal or written, at other times and places made by said Nutz in order to support his credit; but all said objections were overruled, and the said letter and affidavit were received, and the testimony of said Edwards, as above stated, was also received and laid before the jury; to all of which the counsel for the defendant tender this their bill of exceptions, and pray that the answers to the interrogatories of L. N. Nutz, W. Hunstock, William Neff, and Sosthene Allain be deemed and taken as a part of this bill of exceptions, and be copied and certified accordingly.

"THEO. H. MCCALEB, *U. S. Judge.*"

Upon this exception, the case was argued in this court by *Mr. Fendall*, for the plaintiff in error, and *Mr. Gillet*, for the defendant in error.

The counsel for the plaintiff in error made several points, of which it is only necessary to notice the following.

I. Illegal evidence.

This ground is disclosed in the defendant's bill of exceptions, and in the letter and affidavit which it refers to.

Griffey was bound by his contract to "put up," as well as to construct, the steam-engine and sugar-mill; and, in the contract, he reserved to himself the privilege of appointing the engineer to run the engine, during the rolling of the first crop. Leonard N. Nutz was the "engineer appointed to run the engine for the plaintiff." He was thus a very important witness for the plaintiff. His deposition tends to prove, that the steam-engine, sugar-mill, and apparatus supplied by the plaintiff below

were, in every respect, conformable to the contract between the parties; that the plaintiff had, on his part, fully complied with his contract, and that he was entitled to the price which he claimed under the contract, and for extra work. In short, his deposition tended to prove the plaintiff's whole case. Other witnesses deposed to the weakness and insufficiency of the machinery; and their testimony, on many points, is in direct conflict with that of Nutz.

One of these points was especially important. Soon after the sugar-mill was set up, the housings, or frame on which the rollers rest, which are the foundation on which the mill works, broke; and could not be fully repaired during the entire season. In consequence of this very serious injury, the grinding was greatly delayed, and when it recommenced, the work was done much less perfectly. It became a most material subject of inquiry whether this breaking arose from the weakness of the housings, or from some cause for which the manufacturer was not liable. Nutz, in his deposition, swore that the breaking was caused by a piece of iron passing in the rollers in the carrier. Three other witnesses present, or near, at the time when the break was discovered, swore to the contrary of this. In order to induce the jury to give greater credit to Nutz's testimony than to that of the defendant's witness, the plaintiff offered to show that at other times, and to other persons, Nutz had given the same account of the breaking as that contained in his deposition. The objections set out in defendant's bill of exceptions to the admissibility of Nutz's letter of the 3d of April, 1846, and his statement in the presence of Edwards, are relied on in support of the writ of error. In some cases the credit of a witness may be supported by proof of his statements, but this is not a case within the rule. Whatever uncertainty or fluctuation may be discerned among the older authorities, the doctrine which is now well established limits the abduction of confirmatory statements to cases in which the motive of the witness is assailed or brought under suspicion. In such cases, and in such only, evidence is admitted of his having made similar statements when the imputed motive did not exist. This principle is clearly to be collected from the rule, as enunciated in different forms by the most approved writers. See Sir W. D. Evans, 2 Pothier on Obligations, 289; 1 Greenl. Ev. § 469; 1 Starkie's Ev. 148, 149 (Bost. 1826); 3 Starkie's Ev. 1758; 1 Phil. Ev. 308 (ed. N. Y. 1839); 2 Phil. Ev. 445, 446 (ed. N. Y. 1849, from 9th Lond. ed.); Robb v. Hackley, 23 Wend. 50; 24 Wend. 465; 10 Peters, 438, 439; 1 McLean, 211, 212; 8 Wheat. 332; 24 Wend. 425, 426.

In Parker's case, 3 Doug. 242, the evidence of a confirm-

atory statement was rejected, Buller, J. holding "that it was clearly inadmissible, not being upon oath." This objection being sufficient for that case, it was unnecessary for the court to go any further. But the principle is the same, whether the confirmatory statement be sworn or unsworn. In this case, the statement made in the presence of Edwards was not sworn to; and that may have been the very statement that swayed the jury. "It is well settled that, if improper evidence be given, although it may be cumulative only, the judgment must be reversed; for we cannot say what effect such evidence may have had on the minds of the jury." Osgood *v.* Manhattan Company, 3 Cowen, 621; cit. Marquand *v.* Webb, 16 Johns. 89. But whether the confirmatory statement was or was not sworn to, the true questions are, in either alternative, Was the statement made before the imputed or suspected motive existed? (2 Evans's Pothier, 289; 1 Phil. Ev. 308.) Was it made before "the relation" of the witness "to the party or to the cause" existed? (1 Greenl. Ev. § 469.) Was it made "at a time when the witness labored under no interest or influence to misrepresent the fact"? (1 Starkie's Ev. 149; 3 Ibid. 1758.)

Neither Nutz's letter and affidavit, nor his statement in the presence of Edwards, can stand any of these tests. His credit may have been impeached, indirectly, by disproving facts sworn by him; and directly, by proof that his own statements, made when the breaking occurred, were in direct conflict with the account which he gave in his deposition. But his own position on the 3d of April, 1846, when he writ the letter, and in the spring of 1847, when he made the statement in the presence of Edwards, was the same as on the 1st of April, 1847, when he made the deposition. And in regard to his statement in the presence of Edwards, the admission of it in evidence is liable to the further objection, that it was not proved to have been before he gave his deposition. Edwards says that it was made "in the spring of 1847"; but whether before or after the 1st of April in that year he does not say. The "relation to the party and to the cause" which tended to bias the mind of Nutz existed in the fall of 1845, and resulted from his being employed by the plaintiff to set up and work the mill. That bias was at least as strong in April, 1846, the date of the letter, as it was in April, 1847, the date of the deposition; and, consequently, his statements at the former or any intermediate date could not legally be adduced in support of his deposition.

IV. Repugnancy and uncertainty in the judgment.

1. The judgment is against a person not a party to the suit.

2. The judgment is uncertain as to the identity of the defendant.

The suit is brought against "*Frederick* D. Conrad"; in all the pleadings, entries, captions, &c., he is so called, except when he is called "F. D. Conrad"; the contract purports to have been made between the plaintiff and "*Frederick* Daniel Conrad." The judgment is against "*Daniel* Frederick Conrad." The middle name forms no part of the Christian name of a party. Keene *v.* Meade, 3 Peters, 7; Games *v.* Stiles, 14 Peters, 327. The suit, then, is against *Frederick* Conrad, and the judgment is against *Daniel* Conrad.

Mr. Gillet, for the defendant in error, made the following points: —

1. The defendant assailed the veracity of Nutz, by proving that he had given to defendant's witnesses an account of the breaking the housings of the mill which essentially differed from his testimony in the cause, taken before a commissioner. 1 Greenl. Ev. § 462; 1 Phil. Ev. 293; Roscoe's Criminal Ev. 181, 182; 3 Starkie's Ev. 1753; 1 Part of Cowen & Hill's notes on Phil. Ev. 772, and cases there cited.

2. The plaintiff had a right to fortify Nutz's testimony, after it was assailed, by proving that he had formerly given the same account of the transaction. English Authorities: — Gilbert's Ev. 135; Finney's case, McNally's Ev. 378; McCann's case, Ibid. 381; Leary's case, Ibid. 379; Buller's Nisi Prius, 294; Hawkins's Pleas of the Crown, b. 2, c. 46, s. 48; Roscoe's Crim. Ev. 1757, 1758; Sir J. Friend's case, 4 State Trials, 37; S. C., 13 Howell's State Trials, 32; Harrison's case, 2 Howell's State Trials, 861; Lutterel *v.* Regnell, 1 Mod. 282. American Authorities: —Quay *v.* Eagle Fire Ins. Co., by Van Ness, J., 2 City Hall Recorder, 1, 21; Connecticut *v.* DeWolf, 8 Conn. 93; The People *v.* Vane, 12 Wend. 78, 79; Johnson *v.* Patterson, 2 Hawks, 183; State *v.* Twitty, 2 Hawks, 248, 441, 448; Coffin *v.* Anderson, 4 Blackf. 395; Beauchamp *v.* The State, 6 Blackf. 300; The Commonwealth *v.* Bosworth, 22 Pick. 397; Cook *v.* Curtis, 6 Har. & Johns. 86 – 93; Packer *v.* Gonsalus, 1 Serg. & Rawle, 536; Henderson *v.* Jones, 10 Serg. & Rawle, 322; Wright *v.* Deklyne, 1 Pet. 203; Claiborn *v.* Parish, 2 Wash. Va. 148.

3. The defendant below had no right to give in evidence what Nutz had told other persons concerning the sugar-mill, because he (the defendant) had not inquired of him (Nutz) whether he had had any such conversations with such persons, thereby laying a foundation for such evidence. Roscoe, Cr. Ev. 182, 184; Evertson *v.* Carpenter, 17 Wend. 419; Tucker *v.* Welch, 17 Mass. 160; Ware *v.* Ware, 8 Greenleaf, 42; The Queen's Case, 2 Brod. & Bing. 301; 1 Greenleaf's Ev. § 462; 1 Phil. Ev. 593, 1 Cowen & Hill's Notes, 773.

4. If evidence was given by the plaintiff to repel such illegal evidence on the part of the defendant, it merely counteracted the error committed by him, and is no ground of error.

Mr. Justice WOODBURY delivered the opinion of the court.

In this case, there had been four bills of exception filed in the court below, but only one of them by Conrad, the plaintiff in error. We shall, therefore, proceed to dispose of that alone.

It objected to the receipt in evidence of declarations, made by a witness for the original plaintiff, under the following circumstances.

Griffey brought a suit against Conrad for building a mill for him to grind sugar-cane; and, among other defences set up by the latter, was that of weakness and insufficiency in the work and materials furnished. To repel this defence Griffey put in the deposition of Nutz, who was an engineer and aided and superintended the erection of the mill, and who testified to the goodness of both the work and materials.

With a view to contradict and impeach him in what he thus swore, Conrad proved that this witness, soon after the completion of the mill, had given a different account, and especially of the cause of the breaking of some of the machinery; considering it to have happened from the badness of the materials.

Griffey then offered to prove that the witness had since given the same statement, as to the goodness of the work and materials, which was now in his deposition. But Conrad objected to the admissibility of such evidence; and the court below overruled his exception and allowed the evidence to go to the jury.

After due consideration, our opinion is, that this ruling was erroneous.

The practice on this subject seems to differ much in different States, and has occasionally changed in the same State. It is sometimes modified, also, as applied to different classes of cases and witnesses.

Thus, in some places, as in New York, such evidence is, as a general rule, now treated as inadmissible. Robertson *v.* Caw, 3 Barbour, 410; Robb *v.* Hackley, 23 Wend. 50; Dudley *v.* Bolles, 24 Wend. 465. So in Vermont. Gibbs *v.* Linsley, 13 Verm. 208. Though at one time in New York it was allowed, and particularly in certain criminal cases. The People *v.* Vane, 12 Wend. 78; Jackson *v.* Etz, 5 Cowen, 320.

But in some other States this kind of evidence has been deemed competent. As in Massachusetts, in a criminal case, where an accomplice was a witness. Commonwealth *v.* Bos-

worth, 22 Pick. 397. And in Maryland, if the statements were prior in point of time. Cook v. Curtis, 6 Har. & Johns. 93.

In Pennsylvania, also, such statements have been admitted, without reference to their priority. As in Parker v. Gonsalus, 1 Serg. & Rawle, 536; Henderson v. Jones, 10 Ib. 322. So in Indiana. Coffin v. Anderson, 4 Blackf. 398, 399. And in some other States, which need not be repeated, a similar practice appears to prevail.

But in other places, as in England, such evidence, though at one time considered competent, and especially in criminal cases, (Gilb. Ev. 135; McNally's Ev. 378, 381; Bull. N. P. 294; Lutterrell v. Reynell, 1 Mod. 282), is now even there excluded. See Parker's case, 3 Doug. 242; 10 Peters, 440; 1 Phil. Ev. 2 and 3, and 230, note; 1 Starkie's Ev. 187 and note; 23 Wend. 55; 2 Phil. Ev. 445; Brazier's Case, 1 East, P. C. 444; 2 Starkie, N. P. 242.

While the rule was otherwise in England, some of the State decisions already cited were expressly grounded on the rule there (see 10 Serg. & Rawle, 332), and others on cases adopting that rule (4 Blackf. 398).

But since the rule became changed in England, or from being doubtful became well established against the introduction of such testimony, the practice in some States, as in New York and Vermont, has been settled so as to correspond; and in this court, also, it has taken the same direction.

In this court it has been held that such evidence is not admissible, if the statements were made subsequent to the contradictions proved on the other side. Ellicott v. Pearl, 10 Peters, 412, 438.

That was a case from Kentucky. Yet the decision does not appear to have been made to rest on the peculiar laws or practice of that State; but on general principles, and the course pursued of late years in England.

In our judicial system, perhaps the decision should not rest on any local rule, though a different principle seems involved in McNiel v. Holbrook, 12 Peters, 85, where the rule of evidence was changed by a State statute. Clark v. Sohier, 1 Woodb. & Min. 368.

But if it should so rest, we are not aware that in Louisiana, where this case was tried, the practice differs from what appears to be required by sound general principles, independent of any local peculiarities.

So far as regards principle, one proper test of the admissibility of such statements is, that they must be made at least under circumstances when no moral influence existed to color or misrepresent them. 1 Greenl. Ev. § 469; 2 Pothier on Oblig. 289; 1 Stark. Ev. 148: 1 Phil. Ev. 308.

But when they are made subsequent to other statements of a different character, as here, it is possible, if not probable, that the inducement to make them is for the very purpose of counteracting those first uttered. 10 Peters, 440.

This impairs their force and credibility, when, if made before the others, they might tend to sustain the subsequent evidence corresponding with them. 23 Wend. 52; 2 Phil. Ev. 446; 1 Greenl. Ev. § 469.

When made in either way, they are admissible only to sustain the credit of the witness impugned, and not as *per se* proof of the facts stated, and hence if made under oath, as here, but not in legal form as a deposition between these parties, they are none the more admissible, except, if prior in date, they might help to sustain the witness' credit. 10 Peters, 412; King *v.* Eriswell, 3 D. & E. 721.

In this case, then, not having been made prior in time, they do not appear on principle or precedent to be competent.

Another question has been presented, arising on the record, which is not included in any of the exceptions.

It is that the judgment runs against "Daniel Frederick Conrad," when the writ, pleadings, and contract speak only of "Frederick D. Conrad." But the judgment is for the plaintiff against "Daniel Frederick Conrad, *the defendant*." And the name prefixed as defendant in the judgment may well be rejected as surplusage, after verdict and judgment, when the true name had been well described in the writ and pleadings.

The statute of jeofails clearly cures any such defect, where, as here, it can well be understood who was meant by "the defendant." 1 Stat. at Large, 91; 1 Bac. Abr., *Amendment*, B; 1 Peters, 23.

Let the judgment below, however, be on the first ground reversed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

DAVID RANDON, PLAINTIFF IN ERROR, v. THOMAS TOBY.

An agreement by a debtor to apply a certain portion of his crops towards the extinguishment of the debt in consideration of further indulgence, will take a case out of the statute of limitations, and may be set up in avoidance of the plea by way of estoppel upon the debtor.

The defendant is not at liberty to complain that the construction of this instrument was left to the jury, because it was so done at his own request, and because, if the court had construed it, the construction must have been unfavorable to the defendant.

The bankruptcy of the plaintiff prior to the time when he took the notes payable to himself was no legal defence to the action. He was one of the persons authorized to settle up the insolvent estate, and whether or not he accounted to his creditors for the proceeds was no question between him and the maker of the notes.

The plea that the notes were given for African negroes imported into Texas after 1833 was no legal defence. The creditor had no connection with the person who introduced the negroes contrary to law. If the negroes had been declared to be free, the consideration of the notes would have failed, but the debtor still held them as slaves, and therefore received the full consideration for his notes.

THIS case was brought up, by writ of error, from the District Court of the United States for Texas.

It was a suit brought by Toby, a citizen of Louisiana, by way of petition, upon two promissory notes executed by Randon. The notes are stated in the first bill of exception. The reporter will not undertake to trace the history of the suit, and refers to the opinion of the court for his reasons for not doing so. The following table will present a summary view of the condition in which the pleadings were finally placed:—

1847, January 4, petition filed.
1847, February 4, demurrer, plea of limitations, and answer filed by defendant.
1848, February 10, petition amended.
1848, February 28, answer amended, and says notes given for purchase of African negroes, &c.
1848, March 11, defendant withdraws part of first plea, and demurs and excepts to part of petition.
1848, May 15, plaintiff further amends petition.
1848, May 31, defendant further answers plaintiff's amendment, craves oyer, &c.
1848, June 5, defendant amends two pleas and files three further answers.
1848, June 8, plaintiff further amends petition.
1848, June 8, defendant amends answer.
1848, June 9, defendant demurs.
1848, June 12, plaintiff further amends petition.
1848, December 14, defendant further amends answer.
1848, December 15, plaintiff files exceptions to demurrers and pleas.

1848, December 19, defendant further amends answer.
1848, December 19, defendant amends again.
1848, December 22, plaintiff files two demurrers.
1848, December 23, trial.

The trial is thus stated in the record:—

"And thereafter, to wit, on the 23d day of December, in the year of our Lord 1848, being a day of the December term of the said court, the following judgment was rendered in the said cause, to wit:—

"THOMAS TOBY v. DAVID RANDON.

"This day came the parties aforesaid by their attorneys, and upon motion of defendant by attorney, it is ordered that he have leave to amend his answer herein, by filing pleas marked numbers eleven, twelve, thirteen, fourteen, and fifteen; and thereupon, plaintiff excepted to said pleas, and said exceptions were argued; and because it seems to the court, that the exceptions to pleas number eleven and thirteen are well taken, it is ordered that the same be allowed; but because, as to pleas number twelve, fourteen, and fifteen, the said exceptions are not well taken, it is ordered that the same be disallowed; and on further motion of said defendant by counsel, it is ordered that he have leave to amend his said answer, by filing pleas sixteen, seventeen, eighteen, and nineteen, and thereupon the plaintiff excepted to said pleas, and said exceptions were argued; and because it seems to the court that the exceptions to pleas sixteen, eighteen, and nineteen are well taken, it is ordered that the same be allowed; but because, as to plea number seventeen, the said exceptions are not well taken, it is ordered that the same be disallowed; and the parties being now at issue, it is ordered that a jury come here, &c.; whereupon came a jury of lawful men, to wit, F. S. Stockdale, Aidan Pullam, James L. Smithers, John P. Roan, James G. Heard, Israel Savage, J. H. McGill, J. S. Stafferd, Angus McNeill, Frederick Rankin, Augustus Hotchkiss, and J. C. Shaw, who, being sworn well and truly to try the issue joined, upon their oath do say, 'We, the jury, find the issues joined in favor of the plaintiff, and assess his damages, by reason of the breaches of promise in the petition mentioned, to $ 5,758.04.'

"And thereupon, to wit, on the day and year aforesaid, and before the jury aforesaid had retired, the said defendant by his said attorneys excepted to several opinions of the court given upon the trial of the said cause, and tendered eight bills of exceptions, which were received, signed, and sealed by the court, and ordered to be made part of the record in the said cause, and are in the words and figures following, to wit:—

(These bills of exceptions filled seventy-eight pages of the printed record. The following is an abstract of them.)

First Bill.

"Be it remembered, that by the rules of this court the practice and proceedings on the common law side thereof are governed by the laws and rules regulating practice and proceedings in the courts of the State of Texas, except so far as the same may, by some order of this court, or by the laws of the United States, be altered or modified; and that, by the laws of the said State, proceedings are by petition and answer, or plea or pleas, and, if the plaintiff thinks it proper, a special replication to any of the pleas of the defendant may, both by the practice of the courts of the said State, as well as by the general orders of this court, be filed with the effect of a like replication at common law, but no replication is required by the rules; and this cause came on to be tried before the court and jury, on the petition of the plaintiff as amended, and the following pleas of the defendant, which on argument were adjudged sufficient, and were sustained against the exceptions or demurrers of the plaintiff. to wit, pleas numbered two, three, four, five, six, eight, nine, ten, twelve, fourteen, fifteen, and seventeen; the following pleas, numbered seven, thirteen, sixteen, and eighteen, having been on argument adjudged insufficient. And on the trial of the said cause, the plaintiff, to sustain the issues joined, gave in evidence the two promissory notes sued on, in words and figures following, to wit:—

"'$ 1,781$\frac{45}{100}$. *Galveston, June* 21, 1841.

"'Twenty-four months from date, I promise to pay to the order of Thomas Toby, Esq., one thousand seven hundred and eighty-one and $\frac{45}{100}$ dollars, value received, with interest from the 14th of April, 1841, until paid. D. Randon.'

"'$ 1,781$\frac{45}{100}$. *Galveston, June* 21, 1841.

"'Twelve months from date, I promise to pay to Thomas Toby, Esq., or order, one thousand seven hundred and eighty-one and $\frac{45}{100}$ dollars, value received, with interest from the 14th of April, 1841, until paid. D. Randon.'

"Which promissory note was marked 2.

"The plaintiff then offered in evidence the following instrument in writing, marked No. 3:—

"'This instrument of March 14th, 1844, witnesseth, that whereas McKinney & Williams of Galveston, and Thomas F. McKinney, agent of Thomas Toby, of New Orleans, hold several notes drawn by me, and past due, and Thomas F.

M[illegible] some two years since, as agent for McKinney & W[illegible], and the said Thomas Toby [illegible] me for ne-groes [illegible] and [illegible] time of their ma-turity [illegible] I would de-liver [illegible] the said Thomas F. McKinney, each and every year, [illegible] one half of every crop of cotton in payment, less of the amount due the said McKinney and Williams. I [illegible] the amount of purchase of negroes bought of them [illegible] acknowledgment of said amount of purchase of negroes, of which my note to said Toby is part of consideration; and I further agree and oblige myself, that any surplus I may have from the proceeds of the other half of my crops over and above my wants, exclusive of any appropriations or purchase of negroes, shall also be turned over as above; and I further bind and oblige myself, my heirs, assigns, and administrators, that no advantage shall be taken, or any plea of statute of limitations be made, to avoid the payment of said notes, but they shall be and remain in as full force and effect as though they were renewed. D. Randon.'

"To the admissibility of which said writing, the defendant, by his counsel, objected as not sufficient to take the said promissory note, marked 2, out of the statute of limitations. But the court overruled the said objection, made by the counsel of the defendant, and permitted the said writing to be read in evidence to the jury; to which opinion and ruling of the court, permitting the said writing to be read in evidence to the jury, the defendant, by his counsel, excepted, and tendered this his first bill of exceptions, which he prays may be signed, sealed, and made a part of the record in the cause, which is done accordingly.

"John C. Watrous.

"*Saturday, December 23d,* 1848."

Second Bill.

"Be it remembered, that after the jury were sworn to try the issues in this cause, the plaintiff, to maintain the said issues on his part, introduced the evidence contained in the bill of exceptions number one, heretofore filed in this cause; and thereupon the said plaintiff closed the evidence on his part; and the said defendant, to maintain the said issues on his part, gave in evidence the deposition of John Randon, as follows, to wit:—

"'The witness was present at the house of David Randon, about the 1st of November, 1846, when Ephraim McLean came there with a power of attorney from Thomas F. McKinney, authorizing the said McLean to settle all business between the said David Randon and the said Thomas F. McKin-

ney, and the firm of McKinney & Williams, and for the purpose of so settling such business, and the said McLean stated that such was the purpose of his visit. After the settlement between Randon and McLean was agreed upon, witness came to Galveston at the instance of the said David Randon, for the purpose of receiving from Thomas F. McKinney a receipt in full of all claims held by the said McKinney against the said David Randon, and also a cotton obligation. The said McLean knew that the respondent was coming, and what he was coming for, and knew that the respondent came to obtain the receipt and the cotton obligation, and the said McLean consented thereto.

"'When I arrived in Galveston, I remained a day or two, and did not see McKinney; during the time I saw McLean, and he handed me the receipt; I asked him where the obligation was, and he told me he had n't got it. I told him that I must have it, because I was instructed to get that particularly by my uncle, David Randon. I rode out to Mr. McKinney's house, and demanded of him the cotton obligation, which he held against David Randon, and which I was requested to get. As near as I recollect, he said to me, "I remember the obligation, but it is either lost or mislaid; but it is of no consequence in this settlement, for the receipt which I have given McLean for you includes all." I rather insisted on his looking for it, but he said he would n't know where to look for it, as he had been sick for some time, and his papers were mislaid. He seemed to have no objections in the least to giving up the obligation, if he could have found it; he did not suggest any rights which he or any one else had, growing out of the said obligation. Mr. McKinney said the receipt included all, and that the obligation was of no consequence, therefore, to David Randon. David Randon sent to McKinney all the African negroes he had, except two; I think he sent twenty-one; he retained two; one he retained in accordance with the settlement, and the other he purchased and gave his note for.'

"*Cross-examination.*—'The settlement, so far as witness knew, was not reduced to writing; he was present a part, but not all, of the time when the negotiation between Randon and McLean for a settlement was going on; McLean delivered to Randon some notes, but nothing else, so far as witness knew; did not know what notes they were; has heard from David Randon that they were his notes, held by Thomas F. McKinney; witness demanded of Thomas F. McKinney the cotton obligation; did not demand the Toby notes.'

"The counsel for the plaintiff objected to the reading of the foregoing testimony of John Randon.

"And the said defendant, further to maintain the said issues on his part, offered in evidence the following instrument in writing, and to prove the signature to the same to be the handwriting of Thomas F. McKinnev:—

"'*Galveston, November* 11*th*, 1846.

"'Know all men by these presents, that a settlement made a few days since with David Randon, by E. McLean, representing McKinney & Williams, and Thomas F. McKinney, was a full and final settlement of all notes and accounts held by the said firm, or the said McKinney, against said Randon; and the said McKinney & Williams do hereby grant to him, the said Randon, a full release and acquittance of all notes and accounts, according to the tenor of said settlement; it being understood that there is now no unsettled note or account between us, except some land obligations of small value, and an obligation given to E. McLean, in the name of Thomas F. McKinney, for $700, or a return of a negro man, Sam, or one of equal value, which obligation bears date 9th November, 1846. THOMAS F. McKINNEY,

For himself and McKinney & Williams.'

"Whereupon the counsel for the said plaintiff moved the court to exclude the said instrument in writing from going to the jury as evidence in this cause, because the same was not pertinent to any of the issues therein; and the court sustained the objection of the said counsel for the plaintiff, and excluded the said instrument of writing from going to the jury; to which opinion of the court, sustaining the said objection, and excluding the said instrument in writing so offered as evidence, the defendant, by his counsel, excepted; and tendered this his second bill of exceptions, which he prays may be signed, sealed, and made part of the record in this cause, and the same is now done accordingly.

"JOHN C. WATROUS.

"*Saturday, December* 23*d*, 1848."

Third Bill.

"Be it remembered, that on the trial of this cause, after the jury were sworn to try the issues joined, the plaintiff and defendant, to maintain the said issues on their respective parts, introduced the evidence contained in the former bills of exceptions, numbers one and two; and thereupon the said defendant, further to maintain the said issues on his part, gave in evidence a series of accounts which were proved by Thomas F. McKinney to be accounts current in the handwriting of the clerks of the firm of McKinney & Williams, and of Thomas

F. McKinney; the accounts, rendered the 30th of August, 1846, showed a balance at that date in favor of McKinney & Williams against David Randon, of $ 11,997.42; and a balance at the same date in favor of David Randon against Thomas F. McKinney, of $ 2,648.51, which was transferred to the credit of David Randon with the firm of McKinney & Williams, and left the balance due them from Randon $ 9,348.91."

(These accounts extended over ten pages of the printed record, and Thomas F. McKinney was then examined on the part of the defendant. Being cross-examined by the plaintiff.)

"'To what note or notes, from David Randon to Thomas Toby, the instrument in writing, dated March 14th, 1844, and filed with the plaintiff's amendment to his petition, marked No. 3, and fully set forth in the bill of exceptions number one, referred.' And the said Thomas F. McKinney thereupon stated, and gave in evidence before the jury, that the said writing referred to both of the promissory notes sued on, being the same filed with the amended petition, marked 1 and 2, and fully set forth in the bill of exceptions No. 1, heretofore filed in this cause. Whereupon the counsel for the defendant insisted before the court, and moved the court that the said evidence of the said McKinney should be ruled out and withdrawn from the jury, because the same was contradictory to the said writing marked No. 3, as aforesaid, which it pretended to explain, — the said writing referring only to one note from David Randon to Thomas Toby.

"But the court overruled the said motion of the said defendant's counsel, and permitted the said evidence of the said McKinney to remain before the jury. To which opinion and ruling of the court overruling the said motion, and permitting the said evidence to remain before the jury, the said defendant, by his counsel, excepted, and tendered this his third bill of exceptions, which he prays may be signed, sealed, and made a part of the record in this cause; which is done accordingly.

"JOHN C. WATROUS.

"*Saturday, December 23d*, 1848."

Fourth Bill.

"Be it remembered, that on the trial of this cause, after the jury were sworn to try the issue joined, the plaintiff and defendant, to maintain the said issues on their respective parts, gave the evidence which is contained in the bills of exceptions, numbers one, two, and three, heretofore filed in this cause; whereupon the said plaintiff, further to maintain his said issues, examined Thomas F. McKinney, who gave in evidence as follows:" —

(The evidence of McKinney related to the alleged settlement and exhibit No. 3; and defendant then offered a copy of the record in bankruptcy of Toby in Louisiana. This record occupied forty-eight printed pages.)

"And the defendant offered evidence to prove that the Thomas Toby therein named was the plaintiff in this cause; but the counsel for the plaintiff objected to the introduction of such copy as evidence before the jury, as being insufficient to sustain any of the pleas of the said defendant; and such objection was sustained by the court, and the copy aforesaid was not allowed to be introduced as evidence on the part of the said defendant; to which opinion of the court, sustaining the said objection made by the counsel for the plaintiff, and refusing to allow the said copy to go to the jury as evidence, the defendant, by his counsel, excepted, and tendered this his fourth bill of exceptions; which he prays may be signed, sealed, and made part of the record in this cause, and the same is now done accordingly.

"JOHN C. WATROUS.

"*Saturday, December 23d*, 1848."

Fifth Bill.

"Be it remembered, that after the jury were sworn to try the several issues in this cause, the plaintiff, to maintain the said issues on his part, gave in evidence the testimony stated in full in the former bills of exceptions; and thereupon the defendant, also to maintain the said issues on his part, gave in evidence the testimony stated in full in the former bills of exceptions. And the defendant there closed the testimony on his part.

"And thereupon the plaintiff, further to maintain the issues joined on his part, gave in evidence the deposition of Ephraim McLean, as follows: —

"'In the settlement between David Randon and McKinney & Williams, I had no authority to settle any notes drawn by David Randon in favor of Thomas Toby, nor did I know that there were any such notes in existence at the time of said settlement. I cannot now state all that was embraced in the settlement so made by me; there were a great many transactions between the parties, David Randon and McKinney & Williams, of from four to five years' standing.'

"The said plaintiff then introduced as a witness Thomas M. League, and thereupon asked and demanded of the said League 'to state to the jury what he knew about the existence of slavery for life in Africa.' To which question by the said plaintiff's counsel to the said League, the said defendant, by his counsel, objected; because the said evidence was not prop-

erly admissible under any allegation in the pleadings in the said cause; because the said question did not propose any proper and legal manner of proving the existence of slavery for life in Africa; and because it did not appear that the said Thomas M. League was a person qualified to prove such facts. But the court overruled the objection of the defendant's counsel to the said question by the plaintiff to the said Thomas M. League, and permitted the same to be put to the said League, and answered as evidence in this cause before the jury.

"To which opinion and ruling of the court, permitting the said question to be put to the said League, and answered as evidence in this cause before the jury, the defendant, by his counsel, excepted, and tendered this his fifth bill of exceptions, and prays that the same may be signed, sealed, and made a part of the record in this cause; which is done accordingly.

"JOHN C. WATROUS.

"*Saturday, December 23d*, 1848."

Sixth Bill.

"Be it remembered, that after the jury were sworn to try the several issues in the said cause, the plaintiff, to maintain the said issues on his part, introduced the evidence contained in the former bills of exception; and thereupon the defendant also introduced the evidence contained in the former bills of exception, and the plaintiff thereafter introduced the evidence of Thomas M. League, as follows:—

"'Witness has made two voyages to the coast of Africa, the first in the year 1834, the second in the year 1835, and remained on the coast each time about six months. Witness was observant and inquiring in regard to the customs and habits and condition of the people; knows that slavery existed in all parts of Africa where he landed, except in Liberia. A large proportion of the people were slaves. Some masters held great numbers; the slavery which existed was a slavery for life, and was of the most despotic and arbitrary character.'

"*Cross-examined.*—'Witness considers himself as understanding very well the customs and conditions of the Africans among whom he was. Witness did not touch upon the Gold Coast; knows nothing whatever of the Gold Coast or Lucame tribe of Africans; witness was in Liberia, and upon the Slave Coast, and upon the Grain Coast. Besides, the coast of Africa runs a good deal east and west in that portion of it. It was sometimes the case that negroes who were captured in battle were brought from the interior of the country to the African coast and sold.

"'Witness would not feel himself qualified to give information or advice as to the laws which exist among the Africans, but he well knows the habits, customs, and institutions of the country, for he was observant and made them his study, and feels himself qualified to testify in relation to them.'

"Upon the trial of this cause, the counsel for the plaintiff and defendant relied upon certain laws and parts of laws and constitutions of Spain, of the United Mexican States, of the State of Coahuila and Texas, and of the Republic of Texas, copies of the original of which, or correct translations, here follow:"—

(Then followed a decree of the king of Spain and the Indies, December, 1817, and the other laws mentioned above, and the bill of exceptions proceeded thus:—)

"All of which laws and parts of laws and constitutions are to be considered as referring to and making part of the evidence in the said cause; and after introducing the same, the parties closed their testimony in this cause.

"Whereupon the counsel for the defendant moved the court to instruct the jury as follows, that is to say:

"First. That the instrument dated March 14, 1844, does not itself amount in law to an acknowledgment of the justice of any particular claim, and cannot remove the bar of the act of limitations to either of the particular notes now sued on.

"Second. That if the jury believe, from the testimony, that the negroes, for the purchase of whom the notes now sued on were given, were Africans imported into Cuba in the year 1835, and brought from Cuba to Texas in the same year, for the purpose of being held or sold as slaves, they will find for the defendant.

"Third. That if the jury believe, from the testimony, that the negroes, for the purchase of whom the notes now sued on were given, were imported into Texas before the adoption of the constitution of the republic of Texas; and if it has not been proved that they were slaves for life immediately before they were so brought to Texas, and also that they were in bondage at the time of the adoption of the constitution, and also that they were the *bonâ fide* property of the person then holding the same, then the jury will find for the defendant.

"Fourth. That the proof of *bonâ fide* property in the persons of color referred to in the constitution of the republic of Texas, is only a bill of sale or some legal conveyance and possession under it, and that mere proof of possession and acquiescence on the part of those held as slaves is not sufficient proof of property.

"Fifth. That if the jury believe, from the testimony, that the negroes, for the purchase of whom the notes now sued

upon were given, were brought to Texas in the year 1835, then, unless it is also proved to their satisfaction that the same negroes were lawfully held in bondage as indentured servants at the time of the adoption of the constitution of the republic of Texas, the constitution did not make them slaves, and the jury will find for the defendant.

"Sixth. That if the jury believe, from the testimony, that the negroes, for the purchase of whom the notes now sued on were given, did not voluntarily emigrate to Texas, or were not brought to Texas by some person emigrating there with them, but were imported in the course of traffic in negroes, and for the purpose of such traffic, in the year 1835, then the constitution did not make them slaves, and the jury will find for the defendants.

"Seventh. That if the jury believe, from the testimony, that the negroes, for the purchase of whom the notes now sued on were given, were brought from Africa to Cuba for the purpose of traffic, and to be sold as slaves, since the year 1821, then it makes no difference whether they were before held as slaves for life in Africa or not.

"Eighth. That proof of a custom in Africa to hold negroes as slaves, without proof of any law authorizing this custom, or proof that the nations or tribes in Africa have no laws, is not sufficient to show that such negroes were slaves for life.

"Ninth. That proof that slavery exists in other nations or tribes in Africa affords no legal presumption, in the absence of express proof, that slavery exists in the Gold Coast or Lucame tribe; and that the presumption is that the members of that tribe are free.

"Tenth. That if the jury believe that the instrument dated March 14th, 1844, refers alone to notes held against the defendant by Thomas F. McKinney, and if they believe that, at the time of making said instrument, the said McKinney did not actually hold the notes now sued on, then the said instrument does not refer to either of said notes, and cannot take either out of the statute of limitations.

"But the court refused to give the said instructions to the jury.

"To which opinion of the court refusing the said instructions, the said defendant, by his counsel, excepted, and tendered this his sixth bill of exceptions, which he prays may be considered as applicable to the refusal of each and all of said instructions, and be signed, sealed, and made a part of the record in the cause; and the same is done accordingly.

"JOHN C. WATROUS.

"*Saturday, December 23d*, 1848."

Seventh Bill.

"Be it remembered, that after the jury were sworn to try the several issues in this cause, the plaintiff, to maintain the said issues on his part, gave in evidence to the jury the testimony stated in full in the former bills of exceptions; and thereupon the defendant, to maintain the said issues on his part, gave in evidence the testimony also stated in the former bills of exceptions.

"Whereupon the counsel for the defendant moved the court to instruct the jury as follows, that is to say:

"First. That if the jury believe, from the testimony and from the instrument dated March 14, 1844, that the said instrument only refers to one note given by the defendant to the plaintiff, and may refer to the first of the notes set forth in the petition as well as to the second; and that it is uncertain to which it particularly refers, they will not apply it to either, and will find for the defendant as to the first note.

"Second. That if the jury believe, from the testimony, that it was agreed between Thomas F. McKinney and the defendant, at the time of the settlement between them in November, 1846, that the instrument dated March 14, 1844, was to be given up to the defendant, and that at that time the said McKinney was authorized to act as agent of the plaintiff with reference to the settlement of the notes now sued on; then the jury will consider such an agreement as an entire discharge and release of the defendant from any promise expressed in the said instrument or to be implied from it, and as entirely cancelling that instrument for the purposes of this suit, and they will find for the defendant as to the first note.

"And the court indeed gave the said instructions, but also, in connection therewith, and in addition thereto, instructed the jury as follows, that is to say:

"First. That whether the said instrument referred to one or both notes or not, and to which it did refer, were questions of fact for the jury to determine; and if they found that the said instrument referred to that note which would otherwise have been barred by the act of limitations, they would consider it as removing that bar.

"Second. That, notwithstanding what was said in the second instruction hereinbefore set forth, if Thomas F. McKinney was not authorized by the plaintiff to surrender to the defendant the instrument dated March 14, 1844, then his agreement to surrender it, if he made such an agreement in the settlement of his individual transactions, did not prejudice the right of the plaintiff to the possession, production, and effect of such instrument, or prevent its acting as a legal bar to the plea of the

act of limitations; and if the said McKinney had surrendered the paper without authority from Toby, Toby could have given notice to produce the paper at the trial; and, if it had not been produced, could have gone into parol proof of its contents.

"To which opinion of the court, giving the said first-mentioned instructions, and also giving the qualifications and additions immediately preceding, the said defendant, by his counsel, excepted, and tendered this his seventh bill of exceptions, which he prays may be considered as applicable to each of the said instructions, and be signed, sealed, and made part of the record in the cause; which is done accordingly.

"JOHN C. WATROUS.

"*Saturday, December 23d*, 1848."

Eighth Bill.

"Be it remembered, that after the jury were sworn to try the several issues in this cause, the plaintiff, to maintain the said issues on his part, gave in evidence the testimony stated in full in the former bills of exceptions; and thereupon the defendant, to maintain the said issues on his part, gave in evidence the testimony stated in full in the former bills of exceptions. Whereupon the court instructed the jury, among other things, as follows, that is to say:

"First. That the constitution of the republic of Texas, in the 'general provisions,' section ninth, by the words therein used, 'slaves for life previously to their emigration to Texas,' does not necessarily mean 'slaves for life immediately before their emigration to Texas.' [And that the court have no right to put a word into the constitution; that the constitution must be construed as it is, and that the constitutional provision means, that if a man had been a slave for life previous to the time at which he emigrated to Texas, and was held in bondage in Texas at the time the constitution was adopted, and was held in bondage under such circumstances that he would have been the slave of the person so holding him, if slavery existed by law, then the constitution makes him a slave for life.] The last part in brackets was not specially excepted to, and it is here inserted by order of the court, against the wish and the opinion of the counsel for the defendant, who regard it as no part of this bill.

"Second. That the Gold Coast, the Grain Coast, and the Slave Coast are inconsiderable portions of Africa; and that if it has been proved that slavery exists in one of those portions, the jury may reasonably infer its existence in the others, in the absence of all other proof upon the subject. To which opin- of the court, giving the said instructions to the jury, the de-

fendant, by his counsel, excepted, and tendered this his eighth bill of exceptions, which he prays may be considered as applicable to each of the said instructions, and may be signed, sealed, and made part of the record in this cause; which is done accordingly.

"JOHN C. WATROUS.

"*Saturday, December 23d*, 1848."

The verdict and judgment were in favor of the plaintiff, for $5,758.04.

Upon the above exceptions the case came up to this court, and was argued by *Mr. Harris* and *Mr. Johnson*, for the plaintiff in error, and *Mr. Bibb*, for the defendant in error.

The counsel for the plaintiff in error made the following points.

We conceive it would be difficult to give any valid reasons for the decision of the court in sustaining the exceptions to pleas numbered eleven, thirteen, sixteen, and eighteen. By reference to these it will be seen, among other things, that they state that the plaintiff's portion of the purchase-money of these negroes was, in 1840, included in a note executed by the defendant, and made payable to McKinney & Williams; and that while this note was in existence, the said plaintiff, under the insolvent law of Louisiana, made, among other things, a cession of his interest in this note for the benefit of his creditors; that it was accepted by the court and by his creditors, and that syndics were appointed to take charge of said effects; that the notes sued on were given subsequently to said cession, and for the purchase-money of the said negroes; that they were accepted by said plaintiff in fraud of the laws of Louisiana, and of the rights of the creditors of said plaintiff, and of the rights of this defendant; and that when said notes were made and delivered, the knowledge of said cession was fraudulently withheld from this defendant; and that said notes were given without consideration.

To show that the positions taken in these pleas were correct, and the pleas themselves were valid, reference is made to Levy *v.* Jacobs et al., 12 La. Rep. 109; Messes Syndics *v.* Yarborough et al., 11 La. Rep. 531. These authorities show that, when a cession is made by an insolvent debtor, all his property and rights are transferred to his creditors, whether they be placed in his schedule or not.

After the surrender and appointment of syndics, the ceding debtor has no longer any capacity to appear in court in relation to the property surrendered. McIntire *v.* Whiting, 7 La.

Rep. 273. He loses the capacity of instituting suits. Goodwin v. Chesneau, 4 N. S. 103. The sale by him of property not placed on the inventory is a nullity, and will not support prescription. Duplessis v. Roulet et al., 11 La. Rep. 345.

Where he is defendant in the court below, he cannot even appeal in regard to transferred property. Knight & Callender v. Debtors, 10 La. Rep. 228. See Chitty on Contracts, 196.

These authorities, we think, show that the exceptions to these pleas ought not to have been sustained.

The proceedings in Louisiana passed Toby's title to personal property and debts situated in Texas. See Story's Conflict of Laws (ed. 1846), §§ 420, 421. The first of these sections (420) shows that the assignee could maintain an action in Texas in his own name. (See also note 2 to this section.)

Assignees or syndics of a foreign bankrupt may sue. Alivon v. Furnival, 1 Cromp., Mees., & Rosc. 296. See also Story's Conflict of Laws, §§ 398, 399, 355, 566, 353 a; Cook v. Lansing, 3 McLean, 571.

The execution of these notes did not discharge the original debt. Chitty on Contracts, 767, and note; Smith's Mercantile Law, 529, and note; Muldon v. Whitlock, 1 Cowen, 306. See also Glasgow v. Stevenson, 6 N. S. (La. Rep.) 567.

On the part of the plaintiff in error, it will be further contended, that the District Court erred,—

I. In submitting exhibit 3 to the jury, to be construed by them; we contend that it should have been construed by the court. See 1 Starkie's Ev. 463; Morrell v. Frith, 3 Mees. & Wels. 402; 8 Car. & Payne, 246; 1 Bing. 266; Snook v. Mears, 5 Price, 636; Clarke v. Dutcher, 9 Cowen, 678; Chapin v. Warden, 15 Vermont, 560.

II. Said instrument was not such an acknowledgment of the justice of a debt as is required in order to take a case out of the operation of the statute of limitations.

Exhibit 3 amounts only to a contract not to plead the statute of limitations. See Warren v. Walker, 23 Maine, 453.

III. Said instrument (exhibit 3) was not an acknowledgment of any debt or note, according to its tenor, and could not take such debt or note out of the statute of limitations, or enable a party to recover on it. It was merely a promise to pay a debt in a particular way, viz. by delivering an amount of cotton annually. And we contend that the plaintiff cannot make said instrument available in this suit; for, as a contract, it departs from the original note, and cannot sustain it. It amounts in itself to a substantive contract, and controls the rights of the plaintiffs. See Bell v. Morrison, 1 Peters, 362; and Angell on Limitations, ch. 20; see also ch. 21, on Conditional Acknowl-

edgments. This was a restricted acknowledgment or promise. It was a departure from the note, and the obligee cannot use it for the mere purpose of acknowledgment. He cannot take it as the contract of the defendant only.

Again, a party is entitled to recover only when he proves the existence of his claim or debt; a plaintiff is never permitted to recover, when the proof leaves the matter uncertain as to whether the debt is due or not; and in this case, if we admit that exhibit 3 refers to one or the other of the notes sued on, still, we contend, it fully appears, from the face of the instrument, that it refers to not more than one of them, and it is utterly uncertain to which it really does refer. The same argument that might be used to show that it referred to one could, word for word, be used to show that it referred to the other. Hence we contend that it cannot be applied to the first note, so as to take that out of the operation of the statute; for it amounted to no proof that this was the note to which it related. Being thus indefinite, it ought not to have been admitted as evidence.

See Angell on Limitations, 254–257; Bailey *v.* Crane, 21 Pick. 323; Stafford *v.* Bryan, 3 Wend. 532; Moore *v.* Bank of Columbia, 6 Peters, 86; Clarke *v.* Dutcher, 9 Cowen, 678; Holmes *v.* Green, 1 Starkie, 397.

IV. Said instrument was not admissible, because it was a promise to pay or to deliver cotton to Thomas F. McKinney, and not to Thomas Toby, the plaintiff.

V. Thomas F. McKinney, to whom this instrument was given, for a valuable consideration, agreed that it should be given up to Randon and discharged. This, we contend, is proved by the testimony of John Randon; and the court, we think, erred in instructing the jury that special authority from Toby to McKinney to release said instrument was necessary; and unless he was Toby's agent for this purpose, his discharge of the instrument divested Toby of no right under it. It amounted to a contract, new, distinct, and substantive. It was made with Thomas F. McKinney; he was the party to it, and we contend that he had a right to release it, unless Randon knew that his authority had ceased, and that he was acting fraudulently; and we contend that his contract to give it up vacated all rights under it. The presumption was that McKinney continued to act as the agent of Toby until Randon was notified to the contrary. See Story on Agency, ch. 15, p. 493; Chitty on Contracts, 780.

McKinney's testimony shows that this instrument was given to him; that he then held the notes sued on; that it was a promise to him, and, so far as Toby was concerned, he had obtained it gratuitously and officiously.

VI. It is clear from the law of Spain, contained in the transcript, that, had these negroes been slaves in Africa (of which there is certainly no proof), still they would have become free on their arrival in Cuba. Then they contined free, unless they were made slaves by the constitution of the late republic of Texas; and in order that this should have occurred, three things must have existed, viz.:—1st, they must have been slaves for life previous to their emigration to Texas; 2d, they must have been held in bondage when the constitution was adopted; 3d, they must have been "the *bonâ fide* property of the person so holding them." Now, in the first place, we contend that these negroes were free when they were exported from Cuba to Texas. In the second place, we contend that the constitution means only to make those persons slaves who were lawfully held in bondage; it could not be otherwise than that these were tortuously held in bondage. And, in the third place, they being free in Cuba, they could by no possibility whatever, either on that island or in Texas, have become slaves for life; and therefore could not have become the *bonâ fide* property of the person holding them. Besides, the term "emigration," used in the constitution, could not have been intended to mean persons who were imported into Texas for traffic, either mediately or immediately, from the coast of Africa. The whole object and intention of this clause of the constitution seems to have been, to make such as were slaves for life in the United States when they emigrated slaves in Texas. This view of the subject is, we think, sustained by the whole section, and is very strongly sustained by the last portion, which provides that "the importation or admission of Africans or negroes into the republic, excepting from the United States of America, is for ever prohibited, and declared to be piracy." And we contend that the court erred in charging, in effect, that the constitution intended to make slaves of persons who were free before their arrival in Texas.

VII. The court erred in admitting the testimony of Thomas M. League. He was no expert, and was consequently incompetent to testify as to foreign laws or customs.

VIII. The court erred in admitting proof of slavery in Africa, and in charging that this came within the provision of the constitution.

History teaches that slavery in Africa is dependent upon force, and is the result of battles and struggles not recognized by civilized nations, nor by the laws of nations. And such a state of slavery could not have been within the design of the constitution of the late republic. This view is sustained by the Amistad case, 15 Peters, 593.

And it is well known that, in the prosecution of the slave trade, but little regard is paid to the condition of the African, as to whether he is bond or free.

IX. The court erred in charging that the Gold Coast, Slave Coast, &c., are inconsiderable parts of Africa, and proof that slavery existed in one part afforded a presumption that it existed in another part. This, we contend, is repugnant alike to reason and to experience. If a similar case were to be tried in any court in Europe, would proof that slavery existed in Maryland amount to proof that it existed also in Massachusetts? Yet this presumption would be much more reasonable than the charge of the court, for these States are under the same general government, and the different tribes in Africa are all independent, and are generally hostile towards each other

Again, this charge expressly violates that provision of the statute of Texas which provides, that "the judge shall not in any case, civil or criminal, charge or comment on the weight of the evidence or testimony," &c. See Acts of 1846, p. 360, § 99.

These negroes having been introduced into Cuba and into Texas against law, we contend that the purchase-money for which they were sold cannot be recovered; and that it was entirely immaterial whether they were then bond or free. Billard et al. *v.* Hayden et al., 12 English Common Law Reports, 222. See also Law *v.* Hodgson, 2 Campbell's Nisi Prius Reports, 147.

Mr. Bibb, for defendant in error, classified the bills of exceptions according to their subjects, instead of considering them numerically.

First Bill of Exceptions.

The exposition of the instrument No. 3, which the court was moved to adopt, confined it to the one note only; applied it to No. 1, payable 21st June, 1843 (within the period of prescription), to the exclusion of note No. 2, payable 21st June, 1842, more than four years next before suit brought, so that the bar by the statute might apply. That exposition the court refused to adopt, and admitted the instrument to be read in evidence to the jury.

This exposition dwells upon one expression, "my note," to the total neglect of the antecedent and consequent parts. The instrument recites "several notes," held by McKinney & Williams, and Thomas F. McKinney, agent of Thomas Toby, some two years before, on which said Randon had obtained farther indulgence over and above the time of "their maturity"; that said indulgence was granted by Thomas F. McKinney, upon Randon's promise then to appropriate half his crops

every year to pay the amount due said McKinney & Williams, if there be any thing due them over and above the amount of purchase of negroes bought of them, and "then in extinguishment of said amount of purchase of negroes." From this recital it is plain that there were "several notes," not two only, upon which the indulgence had been granted; and that the "several notes," "past due," upon which the indulgence had been so obtained some two years before, were all drawn in consideration "of the amount of purchase of negroes"; and that the proceeds of half the crops were to be applied, secondly, "in extinguishment of said amount of purchase of negroes." So the "several notes" were in consideration "of said amount of purchase of negroes." All the several notes were included in the arrangement of 1844 for payment by the addition of the other half of the crops; all were included in the promise, "that no advantage shall be taken, or any plea of statute of limitations be made to avoid the payment of said notes, but they shall be and remain in as full force and effect as though they were renewed."

Shall the expressions "several notes," "farther indulgence on said notes," "said amount of purchase of negroes," no advantage of the statute of limitations "to avoid the payment of said notes," but "they shall be" as though they were "renewed," be passed over and made nugatory, by harping solely upon the words "of which my note to said Toby is a part of consideration"?

The sages of the law, in the exposition of treaties, pacts, statutes, testaments, deeds, and other instruments, have used and handed down to us rules which are commended as the dictates of enlightened reason and common sense, whereof the following will suffice for the present, viz.:—

"That the construction be made on the entire instrument, and that one part of it doth help to expound another, and that every word (if it may be) may take effect and none be rejected, and that all the parts do agree together, and there be no discordance therein. Ex antecedentibus et consequentibus est optima interpretatio. For Turpis est pars quæ cum suo toto non convenit. Maledicta expositio quæ corrumpit textum."

"That the construction be such as the whole and every part of it may take effect, and as much effect as may be for that purpose for which it was made." Touchstone, ch. 5, § 4, p. 87.

To cavil about the words in subversion of the plain intent of the parties, is a malice against justice and the nurse of injustice. Throckmerton *v.* Tracy, Plowd. 161.

A man ought not to rest on the letter only, "nam qui hæret in litera hæret in cortice, but he ought to rely upon the sense,

which is the kernel and the fruit, whereas the letter is but the shell." Eyston *v.* Studd, Plowd. 467.

"Falsa orthographia, falsa grammatica, non vitiat cartam vel concessionem," nor the singular instead of the plural number, nor the plural instead of the singular. Earl of Shrewsbury's case, 9 Co. 48 a; Co. Litt. 146 b.

"The office of a good expositor is to make construction on all the parts together, and not of one part only by itself. Nemo enim aliquam partem recte intelligere possit, antequam totum iterum atque iterum perlegerit." Lincoln College's case, 3 Co. 59 b; 8 Viner, p. 181, F, a, pl. 7.

Construction must be made in suppression of the mischief, and in advancement of the remedy. Co. Litt. 381, b.

The construction insisted on by the counsellors for Randon, in this bill of exception, violates all the rules of construction; it dwells upon a word only; disregards the preceding and succeeding parts; corrupts the text; sticks in the shell, tastes not of the kernel; and disregards the purport and intent of the writing. The bar, by the statute of limitations, was the mischief to arise from further indulgence; the remedy intended was, that no advantage of the statute should be taken; that the notes should remain in as full force and effect as if renewed. But the exposition insisted on is for the purpose of inflicting the very mischief which the instrument intended to avoid; to apply the remedial agreement to the note payable at twenty-four months, not barred by the statute, and exclude note No. 2, payable at twelve months, that it may be barred.

Third Bill of Exceptions.

After Randon had, by plea upon plea and amendment upon amendment, averred that the only consideration for the notes sued on was African negroes imported into Texas, and sold by said Toby or his agent, and after he had adduced T. F. McKinney as a witness, and proved by him that both the notes sued on were given in consideration of Toby's interest in the negroes, and in the note to McKinney & Williams of 1st September, 1840, and that Randon knew it, then his witness was, upon cross-examination, asked by the counsel for Toby to what note or notes from David Randon to Thomas Toby the instrument in writing dated 14th March, 1844, referred. Said witness answered, "that it referred to both of the promissory notes sued on, being the same filed with amended petition, marked 1 and 2"; thereupon the counsel for Randon moved the court, "that the said evidence of the said McKinney should be ruled out and withdrawn from the jury, because the same was contradictory to the said writing marked No. 3, as afore-

said, which it pretended to explain; the said writing referring only to one note from David Randon to Thomas Toby."

The construction of the instrument insisted on by that objection is still founded upon the one word "note," the one idea "my note," culled out and separated from the body of the instrument, as if the true reading and sense did not save from the statute of limitations the whole debt in arrear for the purchase of the negroes, as well the balance due to Toby for his interest in the negroes, as the balance due to McKinney & Williams upon the note to them of September 1st, 1840, which was also given for the purchase of the negroes.

That the instrument No. 3 refers to the whole amount of the purchase of the negroes, which had been divided into parts, the one part payable to McKinney & Williams, the other payable to Thomas Toby upon the two notes to him for his interest in the negroes, is the legal construction of the instrument. The answer of the witness Thomas F. McKinney, that the instrument referred to both the notes to Toby, is consistent with the legal construction of the instrument when applied to the facts existing at its date; it is not altering nor contradicting the instrument by any new secret averment, but is in accord with its true meaning and legal effect,—with the sound exposition of the instrument viewed in all its parts. The words, "of which my note to said Toby is a part of consideration," are explained by the antecedent and consequent parts to mean, "of which my *debt* to said Toby is part of consideration of the amount of purchase of negroes." The word "note" means token of a debt, paper given in confession of a debt, and may well be used as a noun collective (*nomen collectivum*) to signify a debt upon one consideration divided into two parts, payable at different days.

The court could not have given the opinion that McKinney's testimony contradicted the instrument No. 3, without falsifying fact and law.

Sixth Bill of Exceptions.

This subject is again moved in the sixth bill of exceptions, by two instructions asked of the court and refused.

"1st. That the instrument dated 14th March, 1844, does not itself amount in law to an acknowledgment of the justice of any particular claim, and cannot remove the bar of the act of limitations to either of the particular notes now sued on."

"10th. That if the jury believe that the instrument dated March 14th, 1844, refers alone to notes held against the defendant by Thomas F. McKinney, and if they believe that at the time of making said instrument the said McKinney did not

actually hold the notes now sued on, then the said instrument does not refer to either of said notes, and cannot take either of said notes out of the statute of limitations."

To what has been said heretofore upon the exposition of the instrument of 14th March, 1844, I will add, that it not only acknowledges the justice of the debt to Toby for his part of the negroes, but expressly waives the advantage of the statute of limitations; the maxim is, "Quilibet renunciari potest beneficium juris pro se introducto."

The tenth instruction contains two vices;—1st, a proposition to refer the legal exposition of the instrument to the jury; 2d, a false construction, founded upon the mere letter, in subversion of the sense and intent of the instrument.

In the seventh bill of exceptions this subject is again moved by the first instruction, and exception taken to the qualification with which the court gave that instruction to the jury.

Seventh Bill of Exceptions.

The instruction moved was, "that if the jury believe from the testimony, and from the instrument dated 14th March, 1844, that said instrument only refers to one note given by defendant to plaintiff, and may refer to the first of the notes set forth in the petition as well as to the second, and that it is uncertain to which it particularly refers, they will not apply it to either, and will find for the defendant as to the first note."

The court gave the instruction with this qualification: "that whether the said instrument referred to one or both notes or not, and to which it did refer, were questions of fact for the jury to determine; and if they found that the said instrument referred to that note which would otherwise be barred by the act of limitations, they would consider it as removing the bar."

To this instruction as given, the counsel for Randon excepted.

Still harping upon the word "note," upon the one idea "my note," sticking in the letter, in the moss of the bark, blind to the substance, the counsellors of Randon would not be content with an instruction by the court more favorable than any which ought to have been given upon this their motion. Verily, their devotion to this word "note," to the one idea "my note," evinces a zealous, unreasonable idolatry, divided by a very thin partition from foolishness.

The proper province of the court is to construe the words of a written instrument; the proper province of the jury is to try and find facts, but not the legal meaning and effect of writings.

This instruction as moved ought to have been rejected totally. That the court erred in giving an instruction on the

motion of the defendant Randon, beneficial to him and not to his prejudice, is not assignable for error by him upon his writ of error.

As this seventh bill of exceptions has been mentioned, the other point of exception contained in it may be disposed of.

The counsel for Randon moved the instruction to the jury, secondly stated on page 504, which the court gave, with this addition and explanation: —

"If Thomas F. McKinney was not authorized by the plaintiff to surrender to the defendant the instrument dated March 14th, 1844, then his agreement to surrender it, if he made such an agreement in the settlement of his individual transactions, did not prejudice the right of the plaintiff to the possession, production, and effect of such instrument, or prevent its acting as a legal bar to the plea of the act of limitations; and if the said McKinney had surrendered the paper without authority from Toby, Toby could have given notice to produce the paper at the trial; and, if it had not been produced, could have gone into parol proof of its contents."

This addition to instruction second, moved by Randon's counsel, and given by the court, was necessary and proper, inasmuch as it had been expressly proved by the said Randon's witness, Thomas F. McKinney, and Toby's witness, E. McLean, that the notes to Toby were not included in the settlement alluded to, and that neither McKinney nor McLean had any authority to settle the notes sued on; neither did they profess to Randon to have any such authority.

A person may have an action on a stipulation in his favor in a deed to which he was not a party. Mayor *v.* Bailey, 5 Martin, 321.

Second Bill of Exceptions.

Randon's second bill of exceptions states an objection by the plaintiff Toby to evidence offered of a receipt dated November 11, 1846, signed by Thomas F. McKinney, for himself and McKinney & Williams, according to a settlement made for them by E. McLean, because not relevant or pertinent to any matter in issue; which objection was sustained.

The exclusion of that receipt was clearly proper. There is neither "*ambiguitas latens*," nor *ambiguitas patens*," about which to start an argument. David Randon's witnesses, John Randon and T. F. McKinney, and Toby's witness, McLean, concur that the notes to Toby were not included in the said settlement made by McLean, alluded to in the receipt offered in evidence by Randon; that said McLean had no authority to settle the notes to Toby.

The instrument, upon its face, excludes any pretence that the debt of Randon to Toby due by the notes now sued was settled or acquitted thereby.

Fourth Bill of Exceptions.

The point of the fourth bill of exceptions is this: that the plaintiff, Toby, objected to the evidence offered by defendant, Randon, consisting of the copy of the record of the proceedings in the court of the State of Louisiana between Thomas Toby and Thomas Toby & Brother *v.* Their Creditors; which objection was sustained by the court.

The record objected to is the transcript of the proceeding begun on the 8th of October, 1840, in the State of Louisiana, fifth judicial district, by petition and schedule of estate, filed by the partners Thomas Toby & Brother, and Thomas Toby, in his individual name, against their creditors, under the law of that State respecting insolvent debtors.

Pleas upon this same subject of the *cessio bonorum*, and supposed assignment of Toby's latent right to a part of a chose in action, and his concealment of such assignment when the after notes of the 21st of June, 1841, were executed, are to be found in the record.

Remarks upon such pleas have been reserved, so that the insufficiency of the pleas rejected by the court, and the propriety of the decision of the court in rejecting the record of the proceedings in Louisiana, as to the *cessio bonorum*, might be compressed into one and the same argument. That argument is properly divisible into two heads: —

1. The facts of the case.
2. The law of the case.

1st. As to the facts. The chronological order of events shows that at the filing of the petition and schedule, 8th October, 1840, and at the acceptance thereof by the creditors, at the time of the discharge given by the creditors, and at the time of the confirmation of all those proceedings by the order of the court of 27th November, 1840, the interest of Thomas Toby in the negroes in Texas had been sold, and that interest was included in the note given by Randon to McKinney & Williams, of 1st September, 1840, so that Toby had only an unexpressed, latent, equitable interest in the chose in action for $ 10,949.48, executed by Randon to McKinney & Williams, which included Toby's interest, and also the interest of the other cotenants in the negroes previously sold to Randon. This interest of Thomas Toby in the choses in action, payable to McKinney & Williams, was never severed until the notes now sued on, dated 21st June, 1841, were executed by Randon to Thomas Toby.

Upon these facts the law is clear that the latent, equitable, undivided interest of Thomas Toby in the chose in action, payable to McKinney & Williams, was not assignable, did not pass by the proceedings in Louisiana from Toby to his creditors, and was not required by the laws of Louisiana to have been assigned by Toby to his creditors, under the said proceedings and *cessio bonorum*.

A debt as between debtor and creditor is indivisible without the consent of both. Kelso *v.* Beaman, 6 La. Rep. 90.

No debtor is bound to pay a debt by portions, and no partial transfer can be made by a creditor so as to be binding on a debtor, even when notice is given, except by the express consent of the latter. Miller *v.* Brigot et al., 8 La. Rep. 536; Poydras *v.* Delamere, 13 La. Rep. 101; Mandeville *v.* Welch, 5 Wheat. 277.

Those decisions show that the exception to the admissibility of the record was properly ruled by the court, and that the decisions rejecting pleas respecting the *cessio bonorum* were also proper.

(The arguments of *Mr. Bibb*, upon the fifth, sixth, and eighth bills of exceptions, relative to slavery in Africa, &c., are omitted.)

Mr. Justice GRIER delivered the opinion of the court.

Had this case been conducted on the principles of pleading and practice, known and established by the common law, a short declaration in assumpsit, a plea of *non-assumpsit*, and *non-assumpsit infra sex annos*, would have been sufficient to prepare the case for trial on its true merits. But, unfortunately, the District Court has adopted the system of pleading and code of practice of the State courts; and the record before us exhibits a most astonishing congeries of petitions and answers, amendments, demurrers, and exceptions, — a wrangle in writing extending over more than twenty pages, and continued nearly two years, — in which the true merits of the case are overwhelmed and concealed under a mass of worthless pleadings and exceptions, presenting some fifty points, the most of which are wholly irrelevant, and serve only to perplex the court, and impede the due administration of justice. The merits of the case, when extricated from the chaos of demurrers and exceptions in which it is enveloped, depend on two or three questions, simple and easily decided. We do not deem it necessary, therefore, to inquire whether the court below may have erred in their decision of numerous points submitted to them, which have no bearing on the merits of the case, and are of no importance to the just decision of it. It will be unneces-

sary to decide whether the judge erred in his construction of *the laws of Africa!!!* and other questions of a similar character, provided it shall appear that, on the admitted facts of the case, he should have instructed the jury that the defendant had established no just defence to the plaintiff's action.

On the trial, the plaintiff gave in evidence two notes executed by defendant, and purporting to be for value received, payable to the plaintiff or his order. They were dated in June, 1841, and payable in one and two years. Three distinct defences were set up by defendant, which had some apparent foundation of fact to support them; a fourth, that the defendant had paid the notes to McKinney, the agent of the plaintiff, being proved to be false in fact, need not be further noticed.

1st. The first was the statute of limitations, of four years, of the State of Texas.

2dly. That the plaintiff had made an assignment of all his property to his creditors, and therefore had no right to recover.

And 3dly. That the notes were given for the purchase of negroes imported from Africa to Cuba and thence to Texas in 1835, and consequently that the defendant had received no consideration, because the negroes, being imported contrary to law, were entitled to their freedom.

We shall notice these points of defence in their order.

1st. The plea of the statute of limitations was *primâ facie* good, as to one of the notes, as suit had not been instituted till more than four years after it became due. But the plaintiff rebutted this plea by the exhibition of the following agreement, signed by Randon, the defendant.

"This instrument of March 14th, 1844, witnesseth: That whereas McKinney & Williams, of Galveston, and Thomas F. McKinney, agent of Thomas Toby, of New Orleans, hold several notes drawn by me, and past due; and Thomas F. McKinney, some two years since, did agree for McKinney & Williams, and the said Thomas Toby, to grant me further indulgence on said notes, over and above the time of their maturity; and I did then say, promise, and agree, that I would deliver to him, the said Thomas F. McKinney, each and every year, all the one half of every crop of cotton in payment, first of the amount due the said McKinney & Williams, if there be any thing due them over and above the amount of purchase of negroes bought of them, and then in extinguishment of said amount of purchase of negroes, of which my note to said Toby is a part of consideration; and I further agree and oblige myself, that any surplus I may have from the proceeds of the other half of my crops, over and above my wants, exclusive of any speculations or purchase of negroes, shall also be turned

over as above; and I further bind and obligate myself, my heirs, assigns, and administrators, that no advantage shall be taken, or any plea of statute of limitations be made, to avoid the payment of said notes, but they shall be and remain in as full force and effect as though they were renewed.

"D. RANDON."

This agreement, being founded on a good consideration and accepted by the plaintiff, became incorporated in the notes, and formed a part of the contract, by mutual consent. It extended the time of payment, and the statute did not begin to run till the extended time had expired. It operated also by way of estoppel *in pais* to a defence under the statute of limitations. Otherwise the defendant would gain an advantage by his own fraud, or put the plaintiff to an action on the agreement. On one or the other of these principles, the doctrine of estoppel has its foundation. The plea of the statute is a breach of the agreement, and, to avoid circuity of action, it may be set up in avoidance of the plea. Moreover, the stipulation in this agreement forms a new promise on good consideration to pay the money, which has always been held as a sufficient replication to the plea of the statute of limitations.

It has been a subject of complaint in this case, also, that the court submitted the construction of this instrument of writing to the jury. But the defendant cannot allege this as error. First, because it was done at his own request; and secondly, because the court should have instructed the jury that the construction contended for by the defendant was wholly without foundation. The use of the word "note," in the singular number, instead of "notes," is so palpable a slip of the pen, that its use, although furnishing an opportunity for cavil, could not be said to create an ambiguity on the face of the instrument, or leave any doubt as to its true intent in the mind of any one who will read the whole of it together, and has no intent or desire to pervert it. It refers to "several notes," it acknowledges that "further indulgence was granted on said notes," and "obligates" the defendant not to plead the statute of limitations to "said notes." Both the notes to Toby were admitted to be part of the consideration paid for the purchase of the negroes referred to in the agreement; consequently, the use of the word "note" was a mere error in grammar, or slip of the pen.

By the settlement with McKinney and the firm, and payment of the notes held by them against the defendant, this paper became useless and inoperative as to them; but as there is no pretence that the notes of Toby were paid, the surrender of the agreement to Randon would have been a fraud on

Toby, and the promise of McKinney to do so cannot invalidate its legal effect.

2d. The record given in evidence, to show the insolvency of Toby and his assignment under the proceedings in Louisiana, after the purchase of the negroes and before the notes now in suit were given, constituted no legal defence to the action. The taking of the note payable to Toby was no fraud on the defendant; Toby was himself one of the syndics or assignees to settle his insolvent estate; he had a right to secure the debt and give an acquittance for it, and whether he took the note payable to himself individually, or as syndic, and whether he has accounted for it to his creditors, or may be bound to do it hereafter when the money is received, are questions with which the defendant has no concern whatever.

3d. The plea that the notes were given for African negroes imported into Texas after the year 1833 is equally unavailable, as a matter of defence, with those already mentioned. This fact seems to have been alleged in the pleadings, as showing a want of consideration. On the argument here, it was endeavored to be supported on the ground that the notes were void, because the introduction of African negroes, both into Cuba and Texas, was contrary to law. But in neither point of view will these facts constitute a defence in the present case. If these notes had been given on a contract to do a thing forbidden by law, undoubtedly they would be void; and the court would give no remedy to the offending party, though both were *in pari delicto*. But Toby or his agent, McKinney, had no connection with the person who introduced the negroes contrary to law. Neither of the parties in this case had any thing to do with the original contract, nor was their contract made in defiance of law. The buying and selling of negroes, in a State where slavery is tolerated, and where color is *primâ facie* evidence that such is the *status* of the person, cannot be said to be an illegal contract, and void on that account. The crime committed by those who introduced the negroes into the country does not attach to all those who may afterwards purchase them. It is true that the negroes may possibly, by the laws of Texas, be entitled to their freedom on that account. If the defendant had shown that the negroes had sued out their freedom in the courts of Texas, it would have been a good defence. In every sale of personal property there is an implied warranty of title, for a breach of which a vendee may sue his vendor and recover the price paid; and on a suit for such price may plead want of consideration or eviction by a better title. But that is neither alleged nor proved in the present case. On the contrary, the defendant

held and enjoyed the negroes, and sold them and received their value; and the negroes are held as slaves to this day, if alive, for any thing that appears on the record. As respects the defendant, therefore, he has received the full consideration for his notes, the title to his property has never been questioned, nor has he been evicted from the possession, or threatened with eviction. Consequently he has no right to set up a defence under the implied warranty of title, or for want of consideration.

If the defendant should be sued for his tailor's bill, and come into court with the clothes made for him on his back, and plead that he was not bound to pay for them, because the importer had smuggled the cloth, he would present a case of equal merits, and parallel with the present; but would not be likely to have the verdict of the jury or judgment of the court in his favor.

The defendant has bought these negroes in the condition of slaves *de facto*, with the *primâ facie* evidence of their *status* imprinted on their forehead; he has held them as slaves, he has sold them as such, and he has no right to call upon the court in a collateral action, to which neither the slaves nor their present owners are parties, to pronounce on the question of their right to freedom, especially in support of a defence which has so little to recommend it.

Having thus examined the merits of this case, and shown that the court ought to have instructed the jury to find for the plaintiff on the admitted facts of it, we think it wholly unnecessary to examine further the multitude of demurrers or exceptions spread over the record, as no decision of the court below upon them could have wronged the defendant or affected the merits of the case.

The judgment of the court below is therefore affirmed, with costs.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Texas, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, with costs and damages at the rate of six per centum per annum.

Supplementary Order.

Mr. Bibb, of counsel for the defendant in error, having stated to the court that it appeared on the face of the record of this case, that Thomas Toby was dead, that the citation was served

on Jonas Butler, his administrator, and that the plaintiff in error had accepted such service of the citation, moved the court that the titling of the case in this court be, David Randon, Plaintiff in error, *v.* Jonas Butler, Administrator of Thomas Toby, deceased, and that the judgment of this court be entered in behalf of said Jonas Butler. Whereupon it is now here ordered by the court, that the said motion be, and the same is hereby, granted, and that the clerk make the entries accordingly.

ARTHUR SPEAR, CLAIMANT OF THE SCHOONER LUCY ANN AND CARGO, APPELLANT, *v.* HENRY PLACE, LIBELLANT, FOR HIMSELF AND OTHERS.

Where the admiralty court decreed that a vessel should pay salvage to the amount of one fifth of her value, and that value was shown to be $ 2,600, an appeal to this court would not lie, for want of jurisdiction.

It is the amount of salvage, and not of the vessel, which tests the jurisdiction; the salvage only being in controversy.

The master could not properly represent (without special authority) the consignees of the cargo who had received their respective consignments before the filing of the libel. They lived in the place where the court was held, and ought to have represented their own interests.

The master, therefore, cannot appear for them all conjointly, and in this case the amount of salvage to be paid by the largest consignee would be only $ 1,136.80.

Neither the salvage upon the vessel or cargo, therefore, is sufficient in amount to bring the case within the jurisdiction of this court.

THIS was an appeal from the District Court of the United States for the State of Texas.

It was a libel filed on the 22d of December, 1848, by Henry Place, master of the steamship Globe, for himself and the other owners of the ship, against the schooner Lucy Ann and cargo, for salvage.

The return of the marshal to the writ of seizure was as follows:—

"Received this writ the 22d day of December, 1848, and executed the same day by seizing the schooner Lucy Ann, her tackle, apparel, and furniture; and on the same day seized certain goods, wares, and merchandise, as per bills and bills of lading hereto attached, and marked No. 1, 2, 3, 4, 5, 6, 7, as furnished by the owners and consignees of said goods, which said goods I left in the possession of the consignees, first taking their receipts to be delivered when called for.

"JAMES H. COCKE, *Marshal*,
By H. B. MARTIN, *D. Marshal*."

On the 29th of December, 1848, Spear intervened, claiming as follows: —

"To the Honorable John C. Watrous, Judge of the District Court of the United States within and for the District of Texas.

"And Arthur Spear, of the State of Maine, intervening for his interest in the schooner Lucy Ann, as well as for the other owners of said schooner, and for the owners and consignees of the cargo thereof, and for all whom it may concern; this respondent, the said Arthur Spear, being master of said schooner, and also owner of an interest of about one fourth therein, appears before this honorable court, and claims the said schooner and her said cargo; and for answer to the libel and complaint of Henry Place, of New Orleans, in the State of Louisiana, against the schooner Lucy Ann, her tackle, apparel, and furniture, and all and singular the goods, wares, and merchandises now or late on board of said schooner, in a cause of salvage, civil and maritime, alleges and articulately propounds, as follows," &c., &c.

The case having been dismissed by this court, for the want of jurisdiction, it is not necessary to state the circumstances which gave rise to the claim for salvage.

On the 3d of January, 1849, Norman Hurd and E. P. Hunt were ordered by the court to appraise the schooner, her tackle, apparel, and furniture, and also the cargo; who appraised the vessel, &c., at $2,600, and the cargo at $21,325.73, divided amongst several different owners or consignees as follows: —

J. S. Vedder,	$5,698.00
J. K. Brown,	92.89
Perry & Flint,	100.42
Perry & Flint, for Leyles & Co.,	6.07
Sydnor & Bone,	9,113.34
Rice, Adams, & Co., for acc. Sampson & Co.,	615.21
Rice, Adams, & Co., for their own acc.,	4,566.11
Rice, Adams, & Co., for Rice & Nichols,	1,133.69
	$21,325.73

On the 30th of January, 1849, the District Court passed the following decree: —

"This cause having been heard by the court upon the pleadings and proofs, and the court being now sufficiently advised in the premises, and it appearing to the satisfaction of the court that the schooner Lucy Ann and cargo, now before the court libelled against in this cause are of the value of

$ 23,925.73, to wit, said schooner being of the value of $ 2,600, and said cargo of the value of $ 21,325.73, and the same was, on the 18th day of December, 1848, saved from entire loss and destruction by means of assistance rendered by the steamship Globe, whereof Henry Place was master, and Charles Morgan, John T. Wright, Henry Morgan, and C. Harris, owners; it is therefore ordered, adjudged, and decreed by the court, that the libellants, Henry Place, Charles Morgan, John T. Wright, Henry Morgan, and C. Harris, have and recover in full satisfaction for their salvage the one fifth part of the aforesaid gross amount of the aforesaid value of said schooner and cargo, to wit, the sum of $ 4,785.14, and that said schooner and cargo be, and the same are hereby, charged with and subjected to the payment of said amount of salvage; the said schooner to be charged with the payment of the sum of $ 520 thereof, and the said cargo to be charged with the payment of the sum of $ 4,265.14 thereof. And it is further ordered, adjudged, and decreed, that said schooner Lucy Ann, her tackle, apparel, and furniture, be condemned, and that the same be sold by the marshal of this district for the payment of said sum of $ 520 so assessed thereon as aforesaid, and that said cargo be condemned, and that the same be sold by the marshal of this district, for the payment of said sum of $ 4,265.14 so assessed as aforesaid, and that the proceeds of said schooner and cargo be brought into court to abide the further order of this court herein. And it is further ordered, adjudged, and decreed, that said sales take place on the 24th day of February, 1849, after giving ten days' notice of the time and place of sale, and that all costs and charges in this cause be taxed upon and paid out of the balance of the proceeds of said schooner and cargo after the payment of the aforesaid amount of salvage, unless Arthur Spear, the respondent, shall immediately pay the same into court.

"By agreement of the libellants in this cause, by their proctors, made in open court, it is ordered, adjudged, and decreed by the court, that the sum of $ 4,785.14, decreed to be paid to the libellants in said cause, be distributed, apportioned, and paid to the libellants in proportions as follows, to wit, to Henry Place, the master of the steamship Globe, the sum of $ 250, and to Charles Morgan, John T. Wright, Henry Morgan, and C. Harris, the owners of the steamship Globe, the sum of $ 4,535.14.

From this decree the claimant appealed to this court.

Afterwards the District Court allowed the vessel and cargo to be released, upon payment into court of the amount decreed for salvage and costs.

It was argued by *Mr. Walker*, for the appellants, and *Mr. Coxe*, for the appellee.

Mr. Coxe raised the question of jurisdiction as follows.

So far as regards the cargo, the interests of the owners are not properly represented, as has been intimated; as the vessel was bound to Galveston, the presumption is, that the owners or consignees were there.

The principle of law applicable in such case is, that where the principal is without the country, or resides at a great distance from the court, the admission of a claim and test affidavit by his agent is the common course of the admiralty; but where the principal is within a reasonable distance, something more than a formal affidavit is expected; at least a suppletory oath of the principal should be tendered. 9 Cranch, 244. See also Dunlap's Adm. Pr. 161, 162; The Sally, 1 Gallis. 401; The St. Lawrence, 1 Gallis. 467.

Captain Spear, then, if entitled to make any claim in the case, could only represent the vessel, and had no title whatever to represent the cargo; and as the decree of the District Court only affected the vessel to the amount of $520, the amount in controversy is not sufficient to give this court jurisdiction. Stratton *v.* Jarvis, 8 Peters, 4; The Warren, 6 Peters, 143; Act of March 3, 1803, c. 40 (2 Stat. at Large, 244).

The appraisement shows that the cargo belonged to several parties, and that there were also several consignees. These interests were entirely distinct; no one represented a sufficient amount to entitle him to appeal to this court. Stratton *v.* Jarvis, 8 Peters, 4.

Mr. Justice WOODBURY delivered the opinion of the court.

A libel was filed in the District Court of Texas, December 22d, 1848, by Place, as master of the steamship Globe, and four others, as owners. It was *in rem* against the schooner Lucy Ann, her tackle and cargo, on a claim for salvage.

The material averments were, that the schooner on the 18th of that month, in a fog, got ashore on the north breakers of the bar at the entrance of the port of Galveston; that the libellant, seeing her danger and signals of distress, assisted in getting her off, and saving the vessel and cargo; and the libel then prayed that all persons interested therein be notified to appear and show cause why the libellants should not have a decree for such money or such proportion of the property saved as is a just compensation for their salvage services.

On the same day a writ of seizure issued against the vessel and cargo, wherever found, and the officer the same day re-

turned, that he had seized the vessel; but after taking the cargo, in the hands of seven different owners and consignees, in various and independent proportions, had left it there, on receiving their receipts therefor.

On the 29th of December, at the time notified, Spear, the master and part owner of the schooner, appeared professedly behalf of himself and other owners of both vessel and cargo, and denied most of the allegations in the libel, and any rightful claim by the plaintiffs for salvage, and prayed for judgment and cost in his own behalf.

It was shown at the trial, by the appraisement and evidence, that the schooner was worth $2,600 and the cargo $ 21,325.73, and after a full hearing of the witnesses the salvage decreed by the court was one fifth of the value, being $ 520 on the schooner, and $ 4,265.14 on the cargo.

From this decree Spear entered an appeal; and the first question presented is whether this court has jurisdiction to sustain it.

In order to sustain it, the decree must be of the value of $ 2,000, against his own interests, or those of some persons he can properly represent here.

But his own private interests extend only to about one fourth of the vessel, charged with a salvage of less than $ 200; and if he may be considered as properly acting for the other and absent part owners, the decree against the whole vessel is but $ 520, or $ 1,480 less than is necessary to confer on us jurisdiction in this class of cases.

It is the amount of salvage, if any, which is in controversy, and which tests the jurisdiction, and not the value of the vessel or cargo. Wilson *v.* Daniel, 3 Dallas, 401.

The next inquiry is, whether the salvage on the vessel can be made sufficient to give jurisdiction, by adding any interest of the master in the cargo affected by the decree.

But he does not claim, nor appear to have owned, any part of the cargo.

Nor could he properly, as mere master of the vessel, represent or act for any part of the cargo after it was delivered to the consignees, they residing near, as was the case in this instance, at the time of his appearance as well as at the time of his appeal.

Had the salvage against the cargo been claimed at a distance from the owners or consignees, and while it was in his custody or control, he might *ex officio* possess some power, and be liable to some duty, in watching over it, in their absence. The Schooner Adeline, 9 Cranch, 286. But when, as here, his possession and control had entirely ceased, and the consignees lived in the same city where the court was held, and were in full charge of the cargo, no official connection continued, and no other is set up or pretended to be proved.

In strict law, then, it does not seem competent for him to prosecute any appeal in their behalf, separately or in conjunction with his own interests, without showing some special authority from them for that purpose. Several precedents fully sustain this view.

Thus, in the case of the Schooner Sally and Cargo, 1 Gallis. 402, it is laid down, that, "in all cases where it is practicable, it is the duty of the owners to claim in person, or at least to annex their own affidavit to the special facts stated in support of the claim."

Especially is such the case where the owners or consignees are within the jurisdiction of the court; as it is so easy to do it, if desiring any interference; and as, by the master appearing and appealing without their authority, they might be involved in litigation and costs against their wishes. The Ship St. Lawrence and Cargo, 1 Gallis. 469; Dunlap's Adm. Pr. 161.

But supposing it were too late, after allowing his appearance below in their behalf, to object to his further prosecution of the claim by an appeal, still the insufficiency of the amount of any one decree, or of any one class of interests in any one person or firm, to justify our jurisdiction, is not removed.

In case of an individual claiming for others in admiralty, the rights of each person or firm represented are supposed to be contained or covered in separate decrees, or separate portions of one decree, as each owns separately, and, if not thus considered, one may have to pay, or be made to suffer, for another. Oliver et al. *v.* Alexander et al., 6 Peters, 143; Stratton *v.* Jarvis et al., 8 Peters, 11.

Here the decree relating to the schooner was against persons, not appearing to be owners of any part of the cargo, and, as before shown, was entirely inadequate in amount to give us jurisdiction.

The consignees of the cargo were likewise seven persons or firms, in distinct or separate lots of goods, valued from about $100 in some to the highest in one case of $5,678.

There does not appear to have been any joint interest among them; and though the decree below is inartificial, yet each should pay and be ordered to pay the salvage on his own goods, and no others, as much as if each had in person put in a separate claim. 6 Peters, 150; 8 Peters, 11.

"In such a case," says Justice Story, "though the original libel is against the whole property jointly, yet it is severed by the several claims; and no appeal lies by either party, unless in regard to a claim exceeding a sum of $2,000 in value. This has been the long and settled practice in the admiralty courts of this country." 6 Peters, 150.

The salvage on the largest claim would be only $ 1,136.80, and would have to be paid by J. S. Vedder, the consignee, in order to prevent a sale of his part of the cargo. From its being under $ 2,000, as we before said, he could not appeal, nor any other person for him, so as to confer jurisdiction on us.

It follows, then, that, as no one person, either in his own right or in the right of some other person or firm, and as no one lot of the goods, or owner of the vessel, was subject by the decree to pay as much as $ 2,000 in salvage, the appeal must be dismissed for want of jurisdiction.

Were this result more doubtful, we should feel averse to sustain jurisdiction, unless clearly bound to, in a class of appeals like this, not entitled to favor, unless, in the language of Chief Justice Marshall in The Sibyl, 4 Wheaton, 98, "it manifestly appeared that some important error had been committed."

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Texas, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that this cause be, and the same is hereby, dismissed for the want of jurisdiction.

THE STATE OF PENNSYLVANIA, COMPLAINANT, *v.* THE WHEELING AND BELMONT BRIDGE COMPANY, WM. OTTISAN, AND GEORGE CRAFT. — *Bill in Chancery.*

A day assigned for the argument, at the next term, of a cause upon the original docket of this court.

ORDERED, that the time for taking testimony in the above cause by the commissioner appointed by the order entered 29th May, 1850, and for making the report to this court therein provided for, be extended till the further order of the court: and, that the authority to take testimony in said cause since the first day of the present term be, and the same is hereby, confirmed.

And now comes the complainant by her counsel, and moves the court to assign a day during the present term of this court for a final hearing upon the bill, answers, exhibits, testimony, and commissioner's report in this case.

C. DARRAGH, *Attorney-General of Pennsylvania.*

The motion filed by Mr. Walker, the 18th instant, for the hearing of this cause, was argued by *Messrs. Stanton* and *Walker*, in support of, and by *Messrs. Stuart* and *Johnson*, in opposition to, the same.

The report of the commissioner appointed at the last term having been returned on Thursday, the 13th instant, it is thereupon ordered by the court, that the case be continued to the next term, with leave to each party to file exceptions to the commissioner's report on or before the first Monday of July, — the exceptions to stand for argument on the second Monday in December next. If no exceptions shall be filed by either party, then the case to stand for final hearing on the day last mentioned.

GEORGE M. GILL, TRUSTEE, &c., OF LYDE GOODWIN, *v.* ROBERT OLIVER'S EXECUTORS, AND GLENN AND PERRINE, TRUSTEES.

In 1839 a treaty was made between the United States and Mexico, providing for the "adjustment of claims of citizens of the United States on the Mexican republic."

Under this treaty a sum of money was awarded to be paid to the members of the Baltimore Mexican Company, who had subscribed money to fit out an expedition against Mexico under General Mina, in 1816.

The proceeds of one of the shares of this company were claimed by two parties, one as being the permanent trustee of the insolvent owner of the share, and the other as being the assignee of the provisional trustee and afterwards the assignee of the insolvent himself.

The judgment of the Court of Appeals of Maryland, that the latter claimant is entitled to the money, is not reviewable by this court under the twenty-fifth section of the Judiciary Act.

THIS case came up by writ of error to the Court of Appeals for the Western Shore of Maryland, being the highest court of law and equity in that State; which writ was issued under the twenty-fifth section of the Judiciary Act.

It was argued at last term, on a motion to dismiss for want of jurisdiction. But the court reserved the point till final hearing. On the hearing at this term, the question of jurisdiction continued to be the most important question in the case, — and that on which it was decided by the court.

A brief history of the facts connected with the case, and of the pleadings, will be sufficient to exhibit the questions involved.

In the year 1816, General Xavier Mina, who was at that time connected with the revolutionary party in Mexico in opposition to the authority of Spain, came to the city of Balti-

more, and there entered into a contract with certain gentlemen of that place, who associated themselves under the name of the "Baltimore Mexican Company," for the purchase of a quantity of arms, ammunition, &c., to fit out an expedition against the *then* government of Mexico. On account of the risk attending their delivery and the uncertainty of the payment, it was agreed that Mina should pay one hundred per cent. on the cost of the articles, and interest. The goods were shipped for Mexico, and delivered according to contract, but were not paid for by General Mina, as he was soon after taken prisoner and shot.

From this time till 1825, the recovery of the claim was considered hopeless.

In 1825, Mexico had achieved her independence, and after much solicitation the government was persuaded to acknowledge the justice of this claim, and assume the payment of it by an act of Congress passed to pay the debts of Mina. But notwithstanding the recognition of this claim as a debt, its payment was delayed for many years, and seemed almost hopeless.

Many and larger claims were held by citizens of the United States against Mexico, of which the government had been urging the payment, and finally, on the 11th of April, 1839, a convention was concluded between the Secretary of State of the United States and the Mexican Minister, "for the adjustment of claims of citizens of the United States of America, upon the government of the Mexican republic." By this treaty *all claims* by citizens of the United States upon the Mexican government, &c., were referred to four commissioners, "who were authorized to decide upon the justice of said claims, and the amount of compensation due from the Mexican government in each case."

As the claim of the "Baltimore Mexican Company" had been recognized as a debt of the Mexican government by a solemn act of their Congress, its justice could not well be denied. It was accordingly allowed by the commissioners, on proof of its correctness and exhibition of the original contract with Mina.

David M. Perrine and John Glenn, who claimed to be assignees in trust of eight of the nine shares into which the stock of the company had been divided, received the amount of the award, and according to agreement with their *cestui que trusts*, deposited the money in the Mechanics' Bank of Baltimore, to be distributed according to the respective rights of the parties claiming it.

Soon after this was done, Philip E. Thomas and John

White filed their bill in chancery against said Perrine and Glenn, claiming the share of —— Smith, and praying the intervention and assistance of a court of equity, in order to the just distribution of the proceeds of the award in the hands of the trustees.

The defendants, Perrine and Glenn, came into court, and submitted "that they are willing and desirous that the proceeds of the award may be distributed among the parties under the direction of the court, &c., and join in praying an early reference to an auditor for that purpose."

The money being thus in court for distribution, all persons who laid any claim to it intervened by bill or petition against the trustees and opposing claimants. Among others, the plaintiff in error, George M. Gill, filed his bill, claiming the share and interest of Lyde Goodwin, who was one of the original nine or ten persons who were partners or members of the "Baltimore Mexican Company."

The bill alleges, that this company was formed in 1816; that Lyde Goodwin owned one ninth part of the property; that in February, 1817, Lyde Goodwin applied to the court for the benefit of the insolvent laws of Maryland, which he duly received; that the complainant was appointed permanent trustee, and gave the proper bond for faithful performance of the trust. The bill goes on to state the convention with Mexico in 1839, the award of the commissioners, the receipt of the share of Lyde Goodwin by Glenn and Perrine, under a power of attorney from Oliver's executors, who claimed title to the same under a pretended assignment from George J. Brown, the provisional trustee of said Goodwin, and finally prays that the executors of Oliver, the claimant of the share, and said trustees, may answer, account, and bring the certificates (in which payment was made) into court, that they may be delivered over to complainant.

The complainant filed also another bill against the trustees and all other claimants, for the sum of five per cent. on the whole amount, as due to Lyde Goodwin for services rendered to the company, by contract with them.

The complainant founded his claim to the money in both cases on the allegation "that all Lyde Goodwin's interest in said property and claims had become vested in the petitioner by virtue of his application and the laws of the State."

The answers of the defendants admit the application of Lyde Goodwin for the benefit of the insolvent laws and his discharge; but state that the complainant, Gill, was not appointed permanent trustee till March, 1837; that on the 26th of February, 1817, George J. Brown was duly appointed by the court provisional trustee, and gave bond and security, and

that the debtor, Lyde Goodwin, on the same day executed to said trustee a deed of assignment of all his property. That in 1825 said Brown conveyed to Robert Oliver, and afterwards, on the 30th of May, 1829, Lyde Goodwin assigned and conveyed to said Oliver all his title and interest in the claim of the company on Mexico. The defendants allege and plead, that by these assignments the title to the share of Lyde Goodwin vested in Robert Oliver in his lifetime, who is now represented by his executors.

There was no dispute on the facts of this case, and the only questions of law involved in it are, whether, by the insolvent laws of Maryland, the title of Gill, as permanent trustee, to the money in court, was better. than the previous assignment by the provisional trustee and Lyde Goodwin himself. On the one side it was contended that, by the insolvent act of Maryland passed in 1805, all the property and estate of the insolvent which he held at the time of his discharge vested in his permanent trustee whensoever he should thereafter be appointed, and that the deed from the provisional trustee, George J. Brown, conveyed no title to Oliver, under the insolvent laws. Nor did the deed of Goodwin himself convey any title, because by his insolvent proceedings all his right, title, and interest in this claim became divested.

On the contrary, the executors of Oliver contended that, until the recognition of this claim by Mexico, in 1825, it did not constitute such property as would pass by the insolvent assignment. That after, by the labors of Goodwin and other agents of the company, this claim was assumed by Mexico, and acknowledged as a debt, it vested in Goodwin as a new acquisition, which he might convey. And of this opinion was the Court of Appeals of Maryland.

The judgment of the Court of Appeals of Maryland was as follows: —

"The appeal in this case coming on for hearing, and having been fully argued by the solicitors of the respective parties, has been since fully considered by the court; and it appearing to the court that that part of the decree appealed from of the court below, which directed any portion of the fund in controversy to be transferred or paid to the appellee, George M. Gill, as permanent trustee of Lyde Goodwin, was erroneous, and should be reversed; and it also appearing to the court that said portion of said fund should be paid over and transferred to the appellants, Charles Oliver, Robert M. Gibbs, and Thomas Oliver, as executors of Robert Oliver, in the proceedings mentioned, together with all accumulations of interest or dividends since accruing upon the same:

"It is thereupon, by this court, and the authority thereof, on this 23d day of June, in the year 1849, adjudged, ordered, and decreed, that the said decree of the court below, so far as the same adjudged and decreed any portion of the fund in controversy to be transferred or paid to the said George M. Gill, as permanent trustee of Lyde Goodwin, be, and the same is, reversed and annulled; and this court, proceeding to pass such decree in the premises as they are of opinion should have been passed by the court below, do further adjudge and decree, that all and every part of such portion of said fund, so by the court below decreed to be transferred or paid to said George M. Gill, as trustee aforesaid, be, by the trustees in the proceedings mentioned, David M. Perrine and John Glenn, transferred or paid over to the appellants, Charles Oliver, Robert M. Gibbs, and Thomas Oliver, as executors of Robert Oliver; together with all and every accumulation of interest or dividends, or investments of the same, made or accruing in and upon such part or portion of said fund; and it is further, by this court, and its authority, adjudged and decreed, that all other portions of the decree of the court below, except such as is hereby reversed, be, and the same is hereby, affirmed; it is further adjudged and decreed, that the reversal of the decree of the court below be without costs."

The opinion of the said Court of Appeals was as follows:—

"The majority of this court, who sat in the trial of this cause, (and by which was decreed the reversal of the decree of the County Court,) at the instance of the solicitors of the appellees, briefly state the following as their reasons for such reversal. They are of opinion that the entire contract, upon which the claim of the appellees is founded, is so fraught with illegality and turpitude, as to be utterly null and void, and conferring no rights or obligations upon any of the contracting parties which can be sustained or countenanced by any court of law or equity in this State, or of the United States; that it has no legal or moral obligation to support it, and that therefore, under the insolvent laws of Maryland, such a claim does not pass to or vest in the trustee of an insolvent petitioner. It forms no part of his property or estate, within the meaning of the legislative enactments constituting our insolvent system. It bears no analogy to the cases, decided in Maryland and elsewhere, of claims not recoverable in a court of justice, which nevertheless have been held to vest in the trustees of an insolvent or the assignees of a bankrupt. In the case referred to, the claims, as concerned those asserting them, were, on their part, tainted by no principle of illegality or immorality; on the

contrary, were sustained by every principle of national law and natural justice, and nothing was wanting to render them recuperable, but a judicial tribunal competent to take cognizance thereof. Wholly dissimilar is the claim before us. Such is its character, that it cannot be presented to a court of justice but by a disclosure of its impurities; and if any thing is conclusively settled, or ought to be so regarded, it is that a claim, thus imbued with illegality and corruption, will never be sanctioned or enforced by a court either of law or equity.

Entertaining this view of the case, it is unnecessary to examine the various minor points which were raised in the argument before us."

To review the judgment of the Court of Appeals, Gill sued out a writ of error, and brought the case up to this court.

It was argued by *Mr. Nelson* and *Mr. Dulany*, for the plaintiff in error, and *Mr. Johnson* and *Mr. Campbell*, for the defendants in error.

The point of jurisdiction was thus stated in the brief of the counsel for the plaintiff in error.

5th. That the decision of the commissioners, and their award, conclusively established the amount and validity of the claim of the Mexican Company, which under the act of Congress it was their duty to decide "according to the provisions of said convention, and the principles of justice, equity, and the law of nations." That the Court of Appeals, in deciding that the contract upon which the claim of said company was founded was so fraught with turpitude and illegality as to be utterly null and void, comes in direct conflict with the decision and award of the commissioners. Comegys *v.* Vasse, 1 Peters, 212; Frevall *v.* Bache, 14 Peters, 95; Sheppard *v.* Taylor, 5 Peters, 710.

6th. Wherefore the plaintiff in error will further contend, that by the decision against his claim, set up in the pleadings on the record in this case, under the said treaty, act of Congress, and award in pursuance thereof, by the Court of Appeals, the construction, operation, and effect of the said treaty, act of Congress, and the award in pursuance thereof, were necessarily drawn in question and directly decided. And therefore this court has jurisdiction to entertain the present appeal. 5 Cranch, 344; 6 Cranch, 281; 1 Wheat. 305, 315, 335; 2 Peters, 245, 250, 380, 410; 3 Peters, 290, 352; 4 Peters, 410; 6 Peters, 41, 48; 10 Peters, 363, 398; 16 Peters, 281; Judiciary Act of 1789, § 25; Osborn *v.* Bank of U. States, 9 Wheat. 748.

The following notes of the argument of *Mr. Dulany* show

the reasons why he maintained this point. After giving a narrative of the case he proceeded as follows.

From the foregoing extracts I think it clearly appears, that it was the design of the treaty to give compensation to claims which antecedently had been preferred against the Mexican government, if upon examination they should turn out to be just.

That upon the determination of such claims, and an award given for the amount, the claims themselves became extinguished and merged in the awards, which follows not more from the operation of general principles of law, than the express provisions of the treaty, which in its twelfth article declares that the United States agree for ever to exonerate the Mexican government from any further accountability for claims which should either be rejected by the board, &c., or which, being allowed, &c., should be provided for by the government in the manner before mentioned.

Whoever, then, claims a right to the certificates issued on the award in favor of the Mexican Company must claim it under the treaty by which, and the act of Congress to carry it into effect, they were created. It is to the treaty they owe their existence, their obligation, and their value.

The right and title which the plaintiff in error claims in his petition under the treaty to the certificates in question have never been perfected in him by a delivery of the certificates themselves; nor indeed in any other person. For although they came to the possession of Glenn and Perrine from the Secretary of the Treasury, yet the delivery to them was not as owners, but it was qualified by the terms of the award under which they were issued. The award assigned to "Glenn and Perrine" eight shares of the Mexican Company, including that of Lyde Goodwin, "as trustees for Robert Oliver's legal representatives, and whomsoever else it might concern, in the ratio of their respective interests." Thus the certificates were delivered to Glenn and Perrine as trustees and depositaries for the true owners, whomsoever they might be; and Glenn and Perrine in point of fact, when the plaintiff in error filed his petition, had delivered them to no one, but, on the contrary, had submitted the question of their distribution to the jurisdiction of Baltimore County Court sitting in equity.

Hence it follows, that a perfected title to the certificates in controversy in this case has as yet never vested in either party thereto, but that the right and title demanded on the one side and the other, growing, as the plaintiff in error claims, immediately out of the treaty, remain to be ultimately determined by the true construction thereof by this court, the Court of

Appeals in Maryland having decided against the right thus claimed.

Now, if nothing more appeared in the record than the right claimed by the plaintiff in error in his pleadings, by and under the treaty, and the decision of the court below against the right thus claimed, that brings this cause within the appellate jurisdiction of the Supreme Court, under the twenty-fifth article of the Judiciary Act. 7 Howard, 743–772.

But it is said that, because the plaintiff in error has set forth the title which he derived under the insolvent laws of Maryland to Goodwin's share in the Mexican Company, no such right, title, or privilege, under the convention with Mexico, is set up by the plaintiff in error in his petition, and no decision against any such right, title, &c. made by the court below as would give jurisdiction to review it to this court, under the twenty-fifth section of the Judiciary Act, but that the whole case turns upon the construction of the laws of Maryland.

In this position I apprehend there is great error, and ample authority in the former decisions of this court for its condemnation.

It is perfectly true that the plaintiff in error has alleged that, by the laws of Maryland, the share which was of Goodwin in the Mexican Company, on the 25th of February, 1817, became vested in him, being the permanent trustee of Goodwin, as of that day. And I insist that it is in reference to this very title, thus acquired, under the laws of the State, that the treaty is to be interpreted, in order that the rights and benefits which it designed to bestow should be awarded to the proper person. In this view of the case, the State laws, or general principles of law, are to be construed and interpreted as incidental to, and absolutely essential in, the mere exercise of the power and duty of construing the treaty itself. In determining whether the plaintiff is entitled to the certificates which he claims under the treaty, it is necessary to inquire into the validity of the title under which he claims; and how can this be accomplished without the consideration of all legal questions which might affect that validity, and so influence the decision upon the rights claimed under the treaty? If the plaintiff in error is entitled, by the law of Maryland, to the share in the Mexican Company which was of Lyde Goodwin, in order to receive the benefits and protection of the convention with Mexico, then it becomes necessary in dispensing those benefits, and applying to his case the protection of the treaty, to determine his title upon that law. This has heretofore been the well-established practice of this court.

In Owings v. Norwood, 5 Cranch, 344, C. J. Marshall said:

"Each treaty stipulates something respecting the citizens of the two nations, and gives them rights. Whenever a right grows out of, or is protected by a treaty, it is sanctioned against all the laws and judicial decisions of the States; and whoever may have this right, it is to be protected."

In Smith *v.* The State of Maryland, use of Carroll et al. (6 Cranch, 286; 2 Cond. R. 377), the principle here contended for is fully asserted, and clearly explained and applied. The whole dispute there turned upon the construction of a State statute; and the benefit and protection claimed by the plaintiff in error as arising out of the treaty, it was admitted on both sides, depended upon the interpretation of the Maryland law.

In the opinion of the court they say: "It is contended by the defendants in error, that the question involved in the cause turns exclusively upon the construction of the confiscation laws of the State of Maryland, passed prior to the treaty of peace, and that no question relative to the construction of that treaty did or could occur. That the only point in dispute was, whether the confiscation of the lands in controversy was complete or not, by the mere operation of those laws, without any further act to be done."

"This argument," said the court, "proves nothing more than that the whole difficulty in this case depends on that part of it which involves the construction of certain State laws, and that the operation and effect of the treaty, which constitutes the residue of the case, is obvious so soon as that construction is settled."

The court then asserting its appellate jurisdiction, which had been denied, proceeded to a reëxamination of the State laws, and affirmed the interpretation of them given by the State court to which the writ of error had issued.

In an elaborate opinion of this court, delivered by Justice Story, upon the point now in controversy, in Martin *v.* Hunter's Lessee (3 Cond. R. 571, 572; 1 Wheat. 304), he confirms the principle decided, and approves the case above cited from 6 Cranch.

In page 571 of the Cond. Rep., Justice Story says: "The objection urged at the bar is, that this court cannot inquire into the title, but simply into the correctness of the construction put upon the treaty by the Court of Appeals; and that their judgment is not reëxaminable here, unless it appear on the face of the record that some construction was put upon the treaty. If, therefore, that court might have decided upon the invalidity of the title (and *non constat* that they did not) independent of the treaty, there is an end of the appellate jurisdiction of this court," &c.

"If this be the true construction of the section," he continues, "it will be wholly inadequate for the purposes which it professes to have in view, and may be evaded at pleasure."

After rejecting the construction of the section contended for, he asks: "What is the case for which the body of the section provides a remedy by writ of error? The answer must be in the words of the section. A suit where is drawn in question the construction of a treaty, and the decision is against the title set up by the party. It is, therefore, the decision with reference to the treaty, and not the mere abstract construction of the treaty itself, upon which the statute pretends to found its appellate jurisdiction. How, indeed, can it be possible to decide whether a title be within the protection of a treaty, until it is ascertained what that title is, and whether it have a legal validity? From the very necessity of the case, there must be a preliminary inquiry into the existence and structure of the title, before the court can construe the treaty in reference to that title. If the court below decide that the title was bad, and therefore not protected by the treaty, must not this court have a power to decide the title to be good, and therefore protected by the treaty?"

The above cases are reviewed and confirmed in Crowell v. Randell, 10 Peters, 396.

If, therefore, there was nothing more in the record than that to which reference has been made in these remarks, I think the above cases fully sustain the appellate jurisdiction of the court in this case.

1st. Because the right of the plaintiff in error, claimed in his petition, as therein set forth, necessarily arises out of, or is protected by, the convention between Mexico and the United States.

2d. Because the decree of the Court of Appeals in denying this right, upon whatever grounds the denial proceeded, decided against the right itself.

But, in the second place, it is manifest by the record, and from the opinion and grounds of decision of a majority of the court, that the treaty itself was considered, and that, with reference to the claims of the Mexican Company, its validity was virtually impeached, and its effect and operation altogether denied.

The court say: "That the entire contract, upon which the claim of the appellee," now plaintiff in error, "is founded, is so fraught with illegality and turpitude, as to be utterly null and void, and conferring no rights or obligations upon any of the contracting parties which can be sustained or countenanced by any court of law or equity in this State, or of the United

States; that it has no legal or moral obligation to support it, and that therefore, under the insolvent laws of Maryland, such a claim does not pass to or vest in the trustee of an insolvent petitioner," &c., &c.

The words, "the entire contract," used by the court in its opinion, refer to the agreement made with General Mina by the different members of the Mexican Company.

This agreement will be found referred to in the plaintiff's printed statement, filed in this cause.

In the deposition of Lyde Goodwin, he states that the book showing the contract with Mina had been carried to Mexico, was before the commissioners at Washington, and "that this was the book on which the claim of the Mexican Company was founded and allowed by the commissioners."

The record in this cause will show that the same book was before the Court of Appeals, and constitutes the whole evidence going to show the character of Mina's entire contract with the members of the Mexican Company. It was upon this evidence that the company founded their claims against the Mexican government, and induced a recognition of their validity by the passage of an act of Congress by that government. It was upon the same evidence that the United States were prevailed upon to enter into negotiations with Mexico on behalf of the company, which finally terminated in a treaty in their favor, by the authority and under the provisions of which a board of commissioners was appointed, who on the same evidence pronounced an award in favor of the company, for the amount of their claim against the Mexican government.

Now the question is, whether the decree of the Court of Appeals against the claim of the plaintiff in error, on the ground of the turpitude of the contract out of which it arose, does not necessarily draw into question the validity, effect, and operation of the treaty and act of Congress under which the board of commissioners made their decision and award, directly contrary to that of the Court of Appeals.

The answer to this question will depend, first, on the power of the commissioners, and secondly, upon what they did decide.

By the first article of the treaty the commissioners had power "to examine and decide upon the said claims," that of the Mexican Company being undoubtedly one of them, "according to such evidence as shall be laid before them on the part of the United States and the Mexican republic respectively."

The fourth article declares that the Mexican government shall furnish such documents, &c., as may be in their possession, for the adjustment of said claims "according to the principles of justice, the law of nations, and the stipulations of

the treaty," &c. of amity and commerce between the United States and Mexico.

The fifth article imperatively requires the commissioners to "decide upon the justice of the said claims, and the amount of compensation, if any, due from the Mexican government in each case."

By the first section of the act of Congress passed 12th June, 1840, after directing in what manner the board of commissioners shall be constituted, it declares that the duty of the said board "shall be to receive and examine all claims which are provided for by the" said "convention," &c., &c., "and which may be presented to said commissioners under the same, and to decide thereon according to the provisions of the said convention, and the principles of justice, equity, and the law of nations."

It is perfectly clear, from the above extracts from the treaty and act of Congress, that the commissioners had ample power and authority,—

1st. To decide as to what claims came within the provisions of the convention;

2d. To decide upon the existence of such claims on the evidence produced before them, and their conformity to the principles of equity, justice, and the law of nations; and

3d. To ascertain and fix the amount due on said claims from the Mexican government.

In the exercise of the powers thus conferred, and in fulfilment of the duties imposed upon them, the board of commissioners assembled at Washington, and, with reference to the claims of the Mexican Company, they received the evidence of their contract with General Mina, out of which the claim arose, and ascertained its amount, for which they gave an award in favor of the company against the government of Mexico.

This award refers to the claim of the Mexican Company, and states that it was for arms, vessels, munitions of war, goods, and money furnished to General Mina, for the service of Mexico, in the years 1816 and 1817.

Now the position which I assume is, that the award, made as it was in pursuance of the stipulations of the treaty and its requirements, and those of the act of Congress, and consequently upon the principles of justice, equity, and the law of nations, is perfectly conclusive in all courts of justice as to the innocency of the contract with Mina in 1816, and the validity and amount of the claim growing out of it.

In the case of Comegys *v.* Vasse, 1 Peters, 212, the court use language in regard to the treaty then under discussion which is strictly applicable to the present case:—

"The object of the treaty was to invest the commissioners with full power and authority to receive, examine, and decide upon the amount and validity of the asserted claims against Spain, &c.; their decision within the scope of this authority is conclusive and final. If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises is not reëxaminable. The parties must abide by it as the decree of a competent tribunal of exclusive jurisdiction."

If such be the effect of an award under a treaty, does not the decision of the Court of Appeals in this cause, pronouncing the contract of the company with Mina so infected with turpitude and corruption as that no legal or moral obligation could arise out of it, draw into question, and necessarily decide upon, the effect and operation of the convention, act of Congress, and award made in pursuance thereof, in a case where the plaintiff in error had claimed the funds in dispute in his petition, on the foundation of such convention, act of Congress, and award?

I am aware that it has been suggested that the Court of Appeals decided against the claim of the plaintiff in error, upon the construction of the insolvent laws of Maryland. But upon an examination of the opinion, it is perfectly obvious that they did not do so; on the contrary, it is strongly, if not necessarily, implied, that, if Goodwin's claim had been unaffected by turpitude, it would have passed to and become vested in his trustee, upon Goodwin's insolvency.

The Court of Appeals say that such a claim, that is, a claim originating in turpitude, does not pass under the insolvent laws of Maryland. The last proposition is not an independent one, but is the mere consequence of the first. The Mexican Company's contract with Mina was corrupt, and for that reason "bears no analogy to the class of cases, decided in Maryland and elsewhere, of claims not recoverable in a court of justice, which nevertheless have been held to vest in the trustees of an insolvent or the assignees of a bankrupt." Upon such an impure contract, devoid of any legal or moral obligation, Lyde Goodwin, previous to his application for the benefit of the insolvent laws, had in 1816 no claim whose validity the law would recognize in the shares of the Mexican Company, and as he had no legal right, none could pass to or become vested in the plaintiff in error, as his trustee. Thus was the plaintiff defeated in his suit, upon the very point where he might most surely have trusted to the protection of the treaty and the award under it.

The convention was not made to sanction corrupt and illegal agreements; on the contrary, no contracts, by its express terms, could fall within its provisions, but such as were in con-

formity with "justice, equity, and the law of nations." Upon these principles the commissioners were commanded to decide upon all the claims presented to them. When, then, they received and examined evidence in regard to the contract with Mina, they determined necessarily, in regard to that contract, that it was in its origin innocent and valid, otherwise they could not have allowed, as they did, the claims growing out of it. The decision, therefore, of the Court of Appeals, that their contract was corrupt, that no claim could have arisen out of it, and that the plaintiff in error could not recover, is in direct opposition to the treaty, act of Congress, and award, and in defiance of that protection which they afford to the right of the plaintiff in error, as set up in his petition.

I do not mean to say whether the decision of the court below is right or wrong, but merely that it draws in question necessarily the effect, operation, and validity of the convention with Mexico, and of the award of the commissioners, and therefore falls within the appellate jurisdiction of this court.

The following extract from the brief of the counsel for the defendants in error will show the manner in which they stated the point of jurisdiction.

The power of Brown, as Goodwin's provisional trustee, to assign Goodwin's interest to Oliver, the efficacy of Goodwin's own assignment to Oliver, the construction of the trusts of the deed of the 8th of May, 1841, from Oliver's Executors et al. to Glenn and Perrine, though part of the merits in the State court, are supposed to be no proper subjects of discussion here.

1st. The petitions of the plaintiff in error do not specially set up or claim any right or title under the convention with Mexico, or the act of Congress, or the award made in pursuance of them, nor does the court below decide against any such right or title. The petitions deny the title of Oliver's executors as assignees, and rest their demands on the official character of the plaintiff in error, as giving him title under the insolvent laws of Maryland, and on the trusts of the deed of the 8th of May, 1841, as constituting them trustees for him, being so entitled, and the decision of the State court turns altogether on its construction of those insolvent laws, which confer, in its judgment, no title on the plaintiff in error. Udell *v.* Davidson, 7 How. 771; Smith *v.* Hunter, 7 How. 743; Maney *v.* Porter, 4 How. 55; McDonogh *v.* Millaudon, 3 How. 705; Downes *v.* Scott, 4 How. 502; Kennedy *v.* Hunt, 7 How. 593; Fulton *v.* McAffee, 16 Pet. 149; Coons *v.* Gallagher, 15 Pet. 18; McKenney *v.* Carroll, 12 Pet. 66; Crowell *v.* Randell, 10 Pet. 392; Montgomery *v.* Hernandez, 12 Wheat. 129; Williams

v. Norris, 12 Wheat. 117; Hickie v. Starke, 1 Pet. 98; Mathews v. Zane, 7 Wheat. 206; Owings v. Norwood, 5 Cranch, 344; Smith v. The State of Maryland, 6 Cranch, 286; Plater v. Scott, 6 Gill & Johns. 116; Hall v. Gill, 10 Gill & Johns. 325; 1 Stat. at Large, 384.

2d. The decision of the State court, that Goodwin's claim did not pass to his permanent trustee on account of its illegality and turpitude, does not conflict with the award, or the treaty or act of Congress under which the award was passed, because the commissioners were empowered to decide nothing but the liability of Mexico for the claims set up against that republic, which were admitted by Mexico prior to the treaty, but long after Goodwin's application; and because the said convention or treaty of 1839, and the proceedings under it, cannot affect the question, whether the insolvent laws of Maryland did or did not operate in 1817 to transfer the claim to the trustee of Goodwin, the force and effect of these laws at the time when Goodwin applied being the question before the court below. Comegys v. Vasse, 1 Pet. 212; Sheppard v. Taylor, 5 Pet. 713; Frevall v. Bache, 14 Pet. 97; Maryland Acts of 1805, ch. 110, and 1816, ch. 221; Hall v. Gill, 10 Gill & Johns. 325.

3d. By the well-settled law of Maryland, as applicable to Goodwin's and all other applications for the benefit of the insolvent laws at that period (1817), the plaintiff in error, as trustee of Goodwin under his application, took title to no property, rights, or claims of Goodwin the insolvent, but such as he had at the date of his application. At that period, Goodwin had no possible right or claim against the government of Mexico, which did not come into existence for several years afterwards, nor against the then existing government of Spain in Mexico, which Mina's expedition was designed to overthrow; and the only alleged or possible claim he, Goodwin, then had, was against Mina, under Mina's contract with the Mexican Company; and this contract with Mina, as the State court has declared by its decision, was illegal, and created no right or claim in Goodwin which could or did pass to his trustee, under his said application in 1817. The decision of the State court, therefore, involved but two questions, the first of which was, whether said contract with Mina vested any rights in Goodwin, at the date of his application in 1817, which passed to his trustee; and the second, whether the treaty and award, allowing as against Mexico the claim of the Mexican Company, under its said contract with Mina, had any such operation or retrospect, as to that contract, as to validate it in Maryland as between the original parties, and to validate it *ab initio*, so as to vest in the trustee by retroactive rights and claims under that

contract, which had no legal existence at the period of Goodwin's application. The first question, the defendants in error will maintain, is conclusively established by the decision of the State court, and is not open to inquiry here, as it involves nothing but the decision of the Maryland court upon a Maryland contract, as to the rights created by it, and the transfer of those rights in 1817 to the trustee of the insolvent. The second, and, as the defendants will maintain, the only possible question open here, will be as to the operation of the treaty and award. And as the State court has not expressed any specific opinion as to the treaty, or any right or title set up or claimed under it, the jurisdiction can only be maintained, if at all, by establishing that such a right or title was involved in the decision of the question, and that the treaty did so retroact as to validate said contract *ab initio*, and vest in the trustee of 1817 the rights given by that contract, which rights so vested in the trustee the decision of the State court denied him. And the defendants in error will maintain, that even if there be any such right, title, or privilege specially set up or claimed under the treaty as to give jurisdiction, which they deny, yet the treaty could not have, and was not intended to have, any such operation or retrospect. They will insist that the treaty and award under it had, and could have, no other effect, than to establish the liability of Mexico to pay that claim under the treaty, and settled nothing but the validity of that claim against Mexico; and that by the award made under it to Glenn and Perrine, the trustees of the defendants, the defendants have the only right or title set up, claimed, or obtained under the treaty, which the plaintiff in error can controvert only by showing that they were entitled to the claim thus allowed to the defendants, and that the treaty and award settled no rights as between the claimants, but merely the obligation of Mexico to pay the claim. They will further insist, that the question, whether the original contract between Mina and the Mexican Company gave Goodwin any rights which passed to his trustee in 1817, was a question of Maryland law upon a Maryland contract, upon which Mexico's subsequent recognition or agreement to pay that claim, as due by herself, could have no influence; that Mexico's subsequent agreement to pay the claim herself had no bearing upon the question as to what were the rights of Goodwin in Maryland, under the original contract between Mina and the Mexican Company; and that the express waiver by Mexico, or even by the Spanish government which she overthrew, or the objection of illegality as far as she was concerned, could not affect the question of the validity of the original contract in Maryland, and under the laws of Maryland, and

above all, could not retrospect so as to repeal the laws of Maryland by validating that original contract *ab initio*, and passing the rights under it to the trustee of 1817. And as the result of the whole, therefore, the defendants in error will maintain, that the decision of the State court has conclusively established the original invalidity of the contract, and that the trustee took no rights under it; and that the treaty, if there be any question raised under it, gave the plaintiff in error no right, title, or privilege which can affect that decision, or was denied by the State court. Milne *v.* Huber, 3 McLean, 212; and authorities under the first and second points.

Mr. Justice GRIER delivered the opinion of the court.

If this court can take jurisdiction of this case under the twenty-fifth section of the Judiciary Act, it must be under either the first or third clause, as the second is admitted to be wholly inapplicable to it.

1. The first is, "where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity."

2. The third is, "where is drawn in question the construction of any clause of the Constitution, or of a treaty or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party under such clause," &c.

1. We have sought in vain through the record of this case to find any question raised directly by the pleadings, or "by clear and necessary intendment therefrom," touching the validity of any treaty, statute, or authority exercised under the United States.

Both parties claim certain moneys in court as assignees of Lyde Goodwin, who was a member of the "Baltimore Mexican Company," and entitled to a certain proportion of the money awarded to said company as a just claim on the Mexican government. The validity of the award, or the treaty under which it was made, is not called in question by either party, as both claim under them. In order to ascertain the effect of certain previous assignments made by Lyde Goodwin, the history of the origin of his claim necessarily makes a part of the case.

The treaty and award are introduced as a part of this history, as facts not disputed by either party. The money being in court, both the treaty and the award were *functi officio*, and no decision of the rights of the claimants *inter se* can, in the nature of the case, involve the validity of either.

The decision of the Court of Appeals, that the original contract with Mina in 1816 did not create such a debt as would

pass by the insolvent laws of Maryland, neither directly nor by implication questions the validity of any treaty, statute, or authority under the United States.

That the Baltimore Mexican Company set on foot and prepared the means of a military expedition against the territories and dominions of the king of Spain, a foreign prince with whom the United States were at peace, is a fact in the history of the case not disputed, and which if wrongly found by the court would not give us jurisdiction of the case. That such conduct of the company in making their contract with General Mina was a high misdemeanor, punishable with fine and imprisonment by the fifth section of the act of the 5th of June, 1794, chap. 51, cannot be disputed by any one who will read the statute; and the conclusion drawn therefrom by the court below, that the contract of the company with Mina in 1816, being founded on an illegal transaction, was void by the law of Maryland, where it was made, and passed no equity, right, or title whatsoever to an insolvent assignee in 1817, involved no question of "the validity of any treaty or statute of, or an authority exercised under the United States."

The validity or binding effect of the original contract with Mina is neither directly nor indirectly affirmed, either in the convention with Mexico or in the award of the commissioners under it.

The fact that the "Baltimore Mexican Company" exposed not only their property to capture by the Spanish vessels of war, but their own persons to fine and imprisonment by the authorities of the United States, only enhanced the justice and equity of their claims against the new government of Mexico.

The original contract with General Mina was a Maryland contract, and its validity and construction are questions of Maryland law, which this court is not authorized to decide in the present action.

2. We are equally at a loss to discover in this record where or how "the *construction* of any clause of the Constitution, or of a treaty or statute of, or commission held under the United States," is drawn in question in this case.

As we have already said, both parties claim money in court; and, in order to test the value of their respective assignments from Lyde Goodwin, introduce the history of the claim from its origin.

The treaty and award are facts in that history. They were before the court but as facts, and not for construction. If A hold land under a patent from the United States or a Spanish grant ratified by treaty, and his heirs, devisees, or assignees dispute as to which has the best title under him; this does not

make a case for the jurisdiction of this court under the twenty-fifth section of the Judiciary Act. If neither the validity nor construction of the patent or title under the treaty is contested, if both parties claim under it, and the contest arises from some question without or *dehors* the patent or the treaty, it is plainly no case for our interference under this section.

That the title originated in such a patent or treaty is a fact in the history of the case incidental to it, but the essential controversy between the parties is without and beyond it. So in this case, both claim the money in court. It is a fact that the money has been paid by the republic of Mexico, on a claim which has been pronounced just and equitable by commissioners under the convention of 1839. It is a fact, also, that the origin of this claim was for arms and ammunition furnished for an expedition under General Mina, for the purpose of insurrection against the Spanish government. It is a fact, that the Baltimore Mexican Company, or the individuals composing it, exposed themselves to punishment under the neutrality act. It is a fact, also, that afterwards, when Mexico had succeeded in establishing her independence; when her rebellion had become a successful revolution; that she very justly and honorably made herself debtor to those who perilled their property and persons in her service at the commencement of her struggle. It is a fact that, though this claim was acknowledged as a just debt by Mexico as early as 1825, payment was never obtained till after the award of the commissioners under the convention with Mexico in 1839, "for the adjustment of claims of citizens of the United States on the Mexican republic." It is a fact, that this claim thus recognized by the Mexican Congress was pronounced a just debt in favor of citizens of the United States against the republic of Mexico.

But whether this debt of the Mexican government, first acknowledged and made tangible as such in 1825, did previously exist as an equity, a right, or a chose in action capable of passing by assignment under the insolvent laws of Maryland in 1817, is a question not settled in the treaty or award, nor involving any question as to the construction of either, but arising wholly from without, and entirely independent of either the one or the other. The treaty was, that "all claims of citizens of the United States found to be just and equitable should be paid." The award was, that this claim of the "Baltimore Mexican Company," which had been acknowledged in 1825 as a valid claim by Mexico, was a just debt, not a false or feigned one, and ought to be paid. The money is awarded to be paid to Glenn and Perrine "in trust for whom it may concern." The award does not undertake to settle the equities or rights of

the different persons claiming to be legal or equitable assignees or transferees of the interests of the several members of the company. That is left to the tribunals of the State where the members of the company resided and the assignments were made. In deciding this question, the courts of Maryland have put no construction on the treaty or award, asserted by one party to be the true one and denied by the other. It was before them as a fact only, and not for the purpose of construction. Whether this money paid into court, under the award and first acknowledged by Mexico as a debt in 1825, existed as a debt transferable by the Maryland insolvent laws in 1817, or whether it, for the first time, assumed the nature of a chose in action transferable by assignment after 1825, when acknowledged of record by Mexico, and passed by the assignment of Lyde Goodwin to Robert Oliver, was a question wholly *dehors* the treaty and award, and involving the construction of the laws of Maryland only, and not of any treaty or statute or commission under the United States.

It is a conclusive test of the question of jurisdiction of this court in the present case, that, if we assume jurisdiction, and proceed to consider the merits of the case, we find it to involve no question either of validity or construction of treaties or statutes of the United States.

But the only questions in the case will be found to be, what was the effect of the appointment of George M. Gill in 1837 as permanent trustee, under the insolvent laws of Maryland of 1805? Was the void and illegal contract with Mina, made in 1816, such a chose in action as would pass by such insolvent law in 1817? Or did it first become an assignable claim after it was acknowledged by Mexico in 1825, and, as a new acquisition of Lyde Goodwin after his insolvency, pass by his assignment to Oliver. A resolution of these questions, by or through any thing to be found on the face of the treaty or award, or any necessary intendment or even possible inference therefrom, is palpably impossible.

The whole case evidently turns on the construction of the laws of Maryland, and on facts connected with the previous history of the claim, which are not disputed, and which are incidental to the treaty and award, but which raise no question either as to their validity or construction.

This case is therefore dismissed for want of jurisdiction.

Mr. Chief Justice TANEY, Mr. Justice McLEAN, Mr. Justice WAYNE, and Mr. Justice WOODBURY dissented.

Chief Justice TANEY stated that, in his opinion, this court

had jurisdiction of the question upon which the case was decided in the Court of Appeals of Maryland, and that their decision was erroneous, and ought to be reversed.

Mr. Justice McLEAN concurred in opinion with the Chief Justice.

Mr. Justice WOODBURY.

I object to the form of the judgment to be entered in this case, rather than to the results of it to the parties. By dismissing the writ of error for want of jurisdiction, as is done here, the judgment in the State court is left in full force; whereas, in my view, this court has jurisdiction, and should affirm the judgment in the State court, thus leaving it, as the other course does, in full force, but on different grounds. The consequence to the parties, by pursuing either course, differs so little, that it does not seem necessary to go into any elaborate exposition of the reasons for this dissent, and I shall therefore content myself with stating only the general grounds for it.

All that seems indispensable to give jurisdiction to us in this class of cases is, that the plaintiff in error should have set up, in support of his claim in the State court, some right or title under a treaty or doings by authority from Congress, and that it should be overruled by the State court. See the twenty-fifth section of the act of 1789 (1 Stat. at Large, 85), and various decisions under it, including Owings *v.* Northwood's Lessee, 5 Cranch, 348, and Smith *v.* Maryland, 6 Cranch, 304; 2 Howard, 372. Here the appellant set up in his bill a claim to money under a treaty with Mexico, and an award under it by commissioners appointed by an act of Congress, and the State court, in his opinion, overruled his claim. This, in my view, gives jurisdiction to us, whether the State court decided right or wrong. See Armstrong *v.* Athens County, 16 Peters, 285; Miller *v.* Nichols, 4 Wheat. 311. The very object of the writ of error is to ascertain whether they did decide right or wrong, and the jurisdiction to make this revision of their opinion arises not from its error, but its subject-matter; the latter being a claim set up under some United States authority. Neilson *v.* Lagow, 7 Howard, 775.

The next and only remaining inquiry for me, supposing that we have jurisdiction, is, whether the State court formed a right conclusion in overruling the claim set up by the appellant. I think they did. So far as it rested on authority under the United States, it is by no means clear that they overruled it improperly. The claim, so far as regards the enforcement of the treaty with Mexico, does not seem to have been overruled,

in terms by the State court. That court did not decide that the treaty was corrupt or illegal, or in any way a nullity, when they held that the original contract violated the laws of neutrality. So far, too, as regards the award made by the commissioners, that the Baltimore Mexican Company and their legal representatives had a just claim under the treaty for the amount awarded, it was not overruled at all.

It is not manifest, then, that any thing really in the treaty or in the award, set up by Gill, the plaintiff, was actually decided against, but only something he claimed to be there;—that when the appellants claimed that he, rather than others, was legally entitled to one ninth of the sum awarded to the Baltimore Mexican Company, the State court seems to have overruled that. But in doing this, they must still have held the treaty itself to be valid, and the award of the commissioners under it to be valid, or they could not have decreed this share of the fund to Oliver's executors, as they appear to have done expressly by the record.

All must concede, that the State court speaks in its language against the Mina "contract" alone as illegal, and in terms do not impugn either the treaty or the award; and it is merely a matter of inference or argument that either of these was assailed, or any right properly claimed under them overruled. But it is true the court held that Oliver's executors, rather than the appellant, were entitled to the fund furnished by Mexico, and long subsequent to Mina's contract; but in coming to that conclusion, they seem to have been governed by their views as to their own laws and the principles of general jurisprudence. The treaty or award contained nothing as to the point whether Gill or Oliver's executors had the better right to this share, but only that the Mexican Company and their legal representatives should receive the fund. This last the court did not question.

But who was the legal representative of Lyde Goodwin's share? Who, by insolvencies, sales, or otherwise, had become entitled to it?

That was the question before the court, and the one they settled; and in deciding that, they overruled the claim of Gill to be so, by virtue of any authority in the treaty or award; and in saying that the fund should go to Oliver's executors, as best entitled, rather than Gill, they did it under their own State laws.

It is a general rule for the State tribunals, and not the commissioners, to settle any conflict between different claimants; and the usage, when disputes exist, is not for commissioners to go further than act on the validity of the claim, and decide

besides the superior rights of one of the claimants. Frevall *v.* Bache et al., 14 Peters, 95; Comegys *v.* Vasse, 1 Peters, 212; Sheppard *v.* Taylor et al., 5 Peters, 710.

It is true, that the opinion given in the State court in support of its judgment is not entirely free from some grounds for misconception, yet the judgment itself appears right, and, if erroneous, resting as it does wholly on the State laws, it is not competent for us, under this writ of error, to reverse it. We can reverse it only when wrong, and wrong, too, for deciding improperly against some claim under a United States law or treaty.

This, I think, it has not done. In short, the whole real truth appears to be, that the State court considered the Mina contract in 1817 as a violation of the neutrality act of 1794; and therefore, when Lyde Goodwin failed in the same year, and went into insolvency, that his share in the contract, being illegal and void, could not then pass to his creditors, or his trustee in their behalf. But when the Mexican government, about 1825, adopted the contract, and acknowledged its liability to pay those entitled, the court seems to have thought that their obligation was virtually a new one. It occurred after the insolvency, and hence seems supposed not to have passed to the creditors, any more than did new property subsequently acquired. (See Insolvent Act of 1805, ch. 110, § 2.) Consequently, the commissioners held that the creditors and their trustee were not entitled to its benefits. Goodwin could and did legally assign to Oliver his new rights and new guarantees, for his share from Mexico. These last, though growing out of the original Mina purchase, were not a violation of the act of 1794, — were honorable, though not compellable, and were not deemed illegal either by Mexico or the government of the United States, or the commissioners, or the State court.

Again, under the State laws doubts seemed to arise, (in deciding on which was the proper claimant,) whether the original trustee was not duly appointed in 1817, and could not legally assign this claim, if it passed to him then or afterwards, as he attempted to pass it to Oliver, rather than considering it as belonging to, or vesting in, Gill, the appellant, who was not appointed trustee till 1825, and then in a manner somewhat questionable. (4 Gill & Johns. 392.) That, however, was likewise a point arising exclusively under the State laws, and which we are not authorized to decide in this writ of error.

It is for reasons like these, that, in my opinion, the judgment in the State court, so far as it related to any claim set up and supposed to be overruled under any authority derived from the United States, is within our jurisdiction; but that the State

court did not improperly overrule any such claim so set up, and hence that the judgment in the State court ought to be affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Court of Appeals for the Western Shore of Maryland, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that this cause be, and the same is hereby, dismissed, for the want of jurisdiction.

THE UNITED STATES, APPELLANTS, *v.* DAVID M. HUGHES, ROBERT SEWALL, AND FRANKLIN HUDSON, A MINOR, BY HIS TUTOR, HOLMES HUTCHINSON.

Where a person entered land according to law, but omitted to obtain a patent for it, and another person afterwards obtained a patent from the United States by proceeding as if it were vacant land, knowing at the same time that it was not vacant, the patent thus obtained will be set aside.

Nor is it a sufficient objection to a decree, that the process was by an information in the nature of a bill in chancery, filed by the attorney for the United States. A simple bill in equity would have been better, but this process being so in substance, the case will not be dismissed for want of form.

An individual owner of land would, in such a case, be entitled to the relief of having the patent set aside; and the United States, as a landholder, must be entitled to the same.

The deeds of conveyance filed as exhibits show the property to have been sold for two thousand dollars, and that it was afterwards converted into a sugar estate. This is sufficient to maintain the jurisdiction of this court.

THIS was an appeal from the Circuit Court of the United States for the District of Louisiana.

The attorney of the United States filed an information in the nature of a bill in chancery against David M. Hughes, who was the real defendant, and also against Sewall and Hudson, nominal defendants.

On the 12th of April, 1814, Congress passed an act (3 Stat. at Large, 122) for the final adjustment of land titles in the State of Louisiana and Territory of Missouri.

The fifth section was as follows:—

"Sec. 5. And be it further enacted, That every person, and the legal representatives of every person, who has actually inhabited and cultivated a tract of land lying in that part of the State of Louisiana which composed the late Territory of Orleans, or in the Territory of Missouri, which tract is not rightfully claimed by any other person, and who shall not have

removed from said State or Territory, shall be entitled to the right of preëmption in the purchase thereof, under the same restrictions, conditions, provisions, and regulations, in every respect, as is directed by the act entitled 'An Act giving the right of preëmption in the purchase of lands to certain settlers in the Illinois Territory,' passed February 5, 1813." (See 2 Stat. at Large, 797.)

This act of 1813 prescribed the mode of proceeding; that the party should make known his claim to the register, &c., &c.

Prior to or on the 22d of February, 1822, one John Goodbee presented the following application to the register and receiver of the Eastern District of Louisiana.

"GENTLEMEN, — I apply to become the purchaser of a tract of land by virtue of settlement under the act of Congress of the 12th of April, 1814, situated as follows, in the parish of Iberville, principally on the north side of the Bayou Goula, designated as No. one by the surveyor, and is the same land which was inhabited and cultivated by Daniel Beedle, or Bidelle, in the year 1813, under whose settlement I claim by purchase. This land belongs to the United States, and is not rightfully claimed by any other person; neither has said Bidelle removed from the State. The land claimed has not been surveyed according to law, but I apply for the right of preëmption to one hundred and sixty superficial acres, at the price provided by law, and offer proofs of the facts set forth.

"JOHN GOODBEE."

Whereupon the register and receiver issued the following certificate and receipt.

"No. 8.

"The applicant having proved, to the satisfaction of the register and receiver for the Eastern District of Louisiana, that he has a preëmption right to the land claimed, I, in consequence, certify that he is entitled to one hundred and sixty superficial acres of land, as applied for; subject, however, to the sectional or divisional lines to be hereafter run under the authority of the United States.

"SAM. H. HARPER, *Register.*

"*February 22d*, 1822."

"*Receiver's Office, New Orleans, February 26th*, 1822.

"Received of John Goodbee two hundred dollars, being the purchase-money for one hundred and sixty superficial acres of land, in the parish of Iberville, designated as No. 1 by the sur-

veyor, to which he has a preëmption right, according to the certificate of the register, No. 8, exhibited to me.

"J. J. McLanahan, *Receiver.*

"160 acres *a* $1\frac{25}{100}$, $200. Original filed 9th Oct., 1845.

"Paul Deblieux, *Clerk.*"

Subsequently proper returns of survey were made, on which the land was fully described and designated as lot No. 1, on the north side of Bayou Goula, or section 54 in township 10 (west of the Mississippi) of range 12 east.

On the 14th of May, 1836, David Michael Hughes entered this land as if it were a tract of public land, containing $175\frac{46}{100}$ acres; and on the 16th of April, 1841, obtained a patent from the United States.

On the 3d of April, 1846, the receiver gave a certificate to John Goodbee, that he had received from him the sum of $19.32, the price of $15\frac{46}{100}$ acres at $1.25 per acre, that being the excess of the land beyond the original estimate and payment.

On the 20th of January, 1848, Thomas J. Durant, Attorney of the United States for the District of Louisiana, filed in the Circuit Court an information and bill, commencing as follows:—

"To the Honorable the Judges of the Circuit Court of the United States for the Fifth Circuit and District of Louisiana, in Chancery sitting: Informing, showeth unto your honors, Thomas J. Durant," &c., &c.

The bill then went on to narrate the facts of the case as above set forth.

It further states, that on or about the 14th of May, 1836, Hughes, who resided near the town of Alexandria, Louisiana, did make an application to the register of the land-office of New Orleans, to enter and purchase the said lot of land at private sale, falsely representing to the register that the said land was then subject to entry and sale, and that he was by the said register permitted to enter the said land, as if the same was liable to private entry; and that he, still falsely representing the said land as subject to private entry and sale, did, on the same day, pay the receiver the sum of $219.32, and that there was issued to him by the register the usual certificate given in such cases. That, on the 16th of April, 1841, Hughes presented the said certificate to the Commissioner of the General Land-Office at Washington, still falsely representing the land as subject to private entry and sale, and that he had legally paid for the same, and did procure the commissioner to issue a patent to him. That all the acts and doings of the register

and receiver in permitting Hughes to enter and pay for the land were done in error, and were at the time, and now, null and void; and that the acts and doings of the Commissioner of the General Land-Office were also, then and now, null and void, because the land had long before been sold by the United States to John Goodbee, and that Hughes is bound, in equity and good faith, to restore and give up the patent, and not to pretend or set up any title to the said land.

That Goodbee is dead, and that the land is in the joint occupation and settlement of Robert Sewall, who resides on it, and of Franklin Hudson, a minor, who is represented by his tutor; and that they pretend to possess said land as owners, under title derived from Goodbee; and that the said parties in possession ought to be made parties to the proceedings in the case.

It is further stated, that, so soon as the error in issuing a patent and the other acts preparatory thereto were discovered, Hughes was requested to give up and restore the patent, and receive back the money he had erroneously paid for the land, but refused to do so; on the contrary, he had commenced suit in one of the State courts against the possessors, who hold under Goodbee, to deprive them of the land by means of said patent, to the damage and injury of the United States, who are bound in equity and good faith to hold harmless all persons who have derived title from Goodbee from the consequences of errors and mistakes of their own, and their officers, and particularly from those of the error in issuing a patent to Hughes.

The bill then charges combination and confederacy, and that Hughes had refused to comply with the requests made to him, and sets forth his pretences for so doing; and the defendant Hughes is required to answer the following interrogatories: Nos. 1, 2, 3, 4, 5, 6, 7, 8, and 10; and the other defendants Nos. 9 and 11.

1st. Whether the said land was not entered by David Michael Hughes at the land-office of the United States in New Orleans, on the 14th day of May, 1836?

2d. Whether, in making said entry, he, the said David Michael Hughes, did not represent said land to the register of the land-office as land that was then subject to entry and private sale?

3d. Whether, at the time of making said entry, he, the said David Michael Hughes, did not know that the said land had previously been sold by the United States to John Goodbee?

4th. Whether he, the said David Michael Hughes, did, on the 16th day of April, in the year 1841, obtain or procure a patent for said land from the General Land-Office in Washington?

5th. Whether said David Michael Hughes has, since the patent was procured by him, and before the institution of these

proceedings, been called upon to restore and give up said patent to the proper officer of the United States, on the ground that said patent was erroneously issued and delivered to him, and to receive back the money which he paid into the treasury as the price of said land?

6th. Whether the said David Michael Hughes has not refused to give up said patent when so called upon?

7th. Whether the said David Michael Hughes has not commenced, and is not now carrying on, proceedings at law in one of the State courts of Louisiana, to obtain possession of said land by virtue of said patent; and, if yea, in what court, and who are the parties defendant in said suit?

8th. Whether, at the time of his procuring said patent from Washington, he, the said David Michael Hughes, did not have information, or did not have reason to believe, that the said land had formerly been entered and paid for by John Goodbee?

9th. Whether the said John Goodbee is now alive; and, if not, when did he die?

10th. Whether the said David Michael Hughes did not know, or was not informed, when he entered said land, that the land was in possession of Robert Sewall and of Franklin Hudson; or did he not know or believe that it was in possession of some parties claiming it as owners, and of whom?

11th. In whose possession is said land now, and by what title do the present possessors hold it? Is said title derived from John Goodbee, and how?

The prayer of the bill was for an injunction to restrain Hughes from proceeding at law, upon the patent, to obtain possession of the land; and to restrain him from selling, disposing of, or parting with the same, during the pendency of this suit; and that he may be decreed to deliver up the patent to the United States to be cancelled, as having been issued to him in error, and without right, and for further and general relief.

Sewall and Hudson, the latter by his tutor, answered the bill, setting forth their title derived from Goodbee, praying to be dismissed from court and quieted in their title.

Hughes demurred, and for special causes of demurrer assigned:—

1st. That by the showing in said bill this court has no jurisdiction of the matter presented, as the subject of controversy between this defendant and Sewall and Hudson, being all citizens of Louisiana.

2d. Because, by the showing in said bill, the United States, as complainants, have no interest whatever in the matter in controversy.

3d. That the case made by the bill shows that Robert Sewall

and Franklin Hudson, who are defendants in this bill, are in point of interest the only proper parties to complain against this defendant, and are not properly his co-defendants.

4th. Because, by the case made by the bill, the United States appear to litigate the private rights of one citizen against another citizen, without cause or authority so to do.

5th. Because there is no law to authorize the United States to invoke the courts of the United States to repeal, revoke, and cancel a deed for land given by the United States to a citizen, when the whole price is acknowledged to have been received by the United States for the land sold.

6th. Because the complaint is in form an information by the district attorney of the United States in behalf of the United States, and in behalf of Sewall and Hudson, for matters only cognizable by a court of equity, on a bill in chancery, at the instance of the party aggrieved.

7th. Because the matter asserted as a preëmption right to land in John Goodbee is in law no right of preëmption.

8th. Because, if the right asserted was originally good as a right of preëmption in Goodbee, it is shown by the bill to have been lost, and forfeited as such right, for want of timely payment; and for many other defects, &c., in said bill appearing.

On the 24th of January, 1849, the court sustained the demurrer and dismissed the bill. The United States appealed to this court.

It was argued by *Mr. Crittenden* (Attorney-General), for the United States, and submitted on printed argument by *Mr. Henderson* for the appellees.

Mr. Crittenden made the following points:—

I. That the court has jurisdiction to vacate and cancel the patent issued to Hughes.

Coke, 4 Inst. 88, says, that the Chancellor has jurisdiction to hold plea of *scire facias* to repeal letters patent, and enumerates three cases in which the writ lies for that purpose. 1st. Where the same thing has been granted to different persons, the first patentee shall have the writ to repeal the second patent. 2d. Where a grant has been made upon a false suggestion. 3d. Where a thing has been granted, which by law cannot be granted.

Where any thing has been unadvisedly granted which ought not to be granted, the remedy to repeal is by *scire facias* in chancery. This may be brought either on the part of the king, or, if the grant is injurious to a subject, the king is bound of right to permit him to use his name for repealing the patent in a *scire facias*. 3 Bl. Com. 261; 2 Ib. 346, 348; The Prince's

Case, 8 Co. Rep. 20; The King *v.* Butler, in the House of Lords, 3 Levinz, 220; Cumming *v.* Forrester, 2 Jac. & Walk. 342; Gledstanes *v.* Earl of Sandwich, 4 Man. & Grang. 1029; Brewster *v.* Weld, 6 Mod. 229.

In Attorney-General *v.* Vernon, 1 Vernon, 281, 282, and same case, Ibid. 387–392, it was held that a bill in chancery lies to set aside a grant of land. This was a case of purchase.

That a bill lies is also decided in Jackson *v.* Lawton, 10 Johns. 25; Jackson *v.* Hart, 12 Johns. 77; Seward's Lessee *v.* Hicks, 1 Har. & McHen. 23, which moreover is a bill by individuals. Lord Propietary *v.* Jenings, Ibid. 144; Norwood *v.* Attorney-General ex rel. Bowen, 2 Har. & McHen. 201, 213; Smith and Purviances *v.* Maryland ex rel. Yates, Ibid. 244, 252; Miller *v.* Twitty, 3 Dev. & Bat. 14; 1 Story's Eq. 121, 155, 157.

Mr. Wirt was of opinion, that patents for land issued by the United States might be repealed either by *scire facias* or bill. Opinions, 334. The case of Jackson *v.* Lawton, above cited, is to the same effect. But it may be a question whether a *scire facias* lies in such a case, there being no statute on the subject, and the patent not being a matter of record. However that may be, it is very clear, by the authorities above referred to, that a bill in chancery lies, which is the mode of proceeding adopted in this case. See also Polk's Lessee *v.* Wendell, 9 Cranch, 99.

II. That the patent issued to Hughes ought to be vacated and cancelled, the same having been issued in error, and without authority of law, and upon false representations and suggestions.

The purchase made by Hughes of lot No. 1 was by private entry. This entry was void, the land not having been previously offered at public sale. The fourth section of the act of 24th of April, 1820 (1 Land Laws, 224), is express on this point. The patent upon this void entry was therefore issued without authority of law, and void.

The evidence to sustain this point, that the land was not offered under the President's proclamation of the 11th of August, 1823, is to be found in the letter of the register of the land-office at New Orleans, of the 23d of February, 1846, exhibit C, of the bill. It will be remembered that the certificate to Goodbee, allowing the preëmption, is dated 22d February, 1822, and is signed by Samuel H. Harper, the register, and that the price was paid to the receiver on the 26th of the same month. Now the evidence is, "that on the tract book, under the President's proclamation of 11th August, 1823, lot No. 1, north side of Bayou Goula, is there registered in the order of sale, but opposite is written, in the handwriting of Samuel H. Harper, the then register, "sold." Mr. Harper had previously al-

lowed Goodbee's preëmption, and he therefore marked the lot as sold on the tract book, under the proclamation.

But even if the land had been offered at public sale, the private entry of Hughes was void, because the register and receiver had no authority to sell and receive the purchase-money of lands which had been already sold. The lands authorized to be sold are the public lands of the United States. Act of 24th April, 1820, 1 Land Laws, 323. The land in question had become the property of Goodbee, under the act of 1814, by the allowance of the preëmption claim by the register and receiver, whose decision by the terms of the act is conclusive: "And in every case where it shall appear to the satisfaction of the register and receiver, that any person who has delivered his notice of claim is entitled, according to the provisions of this act, to a preference in becoming the purchaser of a quarter-section of land, such person so entitled shall have a right to enter the same," &c. See Wilcox *v.* Jackson, 13 Peters, 498. The sale and patent to Hughes were, therefore, made and issued without authority of law, and void.

By the demurrer, Hughes admits the charge in the bill, that he represented the land to be liable to entry and sale.

III. That the land was subject to preëmption by Goodbee, and his claim thereto properly allowed.

It does not appear at what date Goodbee made his application, it having no date; but it is certain his claim was allowed on the 22d of February, 1822, and that he paid the purchase-money on the 26th, for "one hundred and sixty superficial acres of land, in the parish of Iberville, designated as No. 1 by the surveyor, to which he has a preëmption right, according to the certificate of the register, No. 8, exhibited to me." At the date of the payment, it is therefore clear that the lands had been surveyed. In the following year all the lands in the township which had been surveyed were proclaimed for public sale by the President.

In order that the court may understand why the land was designated lot No. 1, it is necessary to state that, by the second section of the act of 3d March, 1811, the surveyors were "authorized, in arranging and dividing such of the public lands in the said Territory (Orleans), which are or may be authorized to be surveyed and divided, as are adjacent to any river, lake, creek, bayou, or watercourse, to vary the mode heretofore prescribed by law, so far as relates to the contents of the tracts, and to the angles and boundary lines, and to lay out the tracts, as far as practicable, of fifty-eight poles in front and four hundred and sixty-five poles in depth, of such shape and bounded by such lines as the nature of the country will render practi-

cable and most convenient," &c. (1 Land Laws, 190.) In the first surveys made in Louisiana, therefore, the public lands on watercourses were always laid out according to the mode above directed, which was the ancient French and Spanish mode, —a narrow front on a stream, and running back for quantity. The number of acres embraced within the area of the measures given is one hundred and sixty acres, or thereabouts. On the plats, these lots were numbered continuously, sometimes, where the watercourse was long, running through many townships. In the township in which the land in question is situated, they are numbered 1, 2, &c. on the north side of Bayou Goula; and 1, 2, &c. on the south side. In the proclamation of 1823, they are proclaimed as lots numbered in the same way, lying on the north and south sides of the bayou.

The General Land-Office has uniformly allowed preëmptions under the act of 1814, on the land thus surveyed; and in cases where, by the subsequent surveys of the adjacent lands, these lots have been found to contain more than one hundred and sixty acres, they have allowed the preëmptor to enter the additional number of acres. As having some bearing on this, see the first section of the act of 29th April, 1816 (1 Land Laws, 281), which seems to have been made to correct a construction of the land-office with respect to preëmptions under the acts of 1813 or 1814, to be found in 2 Land Laws, no. 220, 221. The other portions of the townships directed to be surveyed on the watercourses were surveyed in the usual manner, into sections of a mile square, and fractional sections, and these were connected with the watercourse surveys, the whole forming one connected plat. When this was done, the whole sections, fractional sections, and lots were numbered anew as sections, the lots, however, also retaining their original numbers. For instance, in this particular case, the land stands on the completed plat both as lot No. 1 and section 54. The survey of the township on which the land in question lies was not completed until 1830. When the surveys were completed, lot No. 1 was found to contain one hundred and seventy-five acres, and for the additional number of fifteen acres the parties who now hold under Goodbee paid the receiver on the 3d of April, 1846.

By the allowance of the preëmption, in 1822, Goodbee, as the representative of Beedle, acquired the land in question, and the United States parted with all their interest in it. In Carrol *v.* Safford, 3 Howard, 461, in speaking of the liability of lands, held by purchasers from the United States who had not received their patents, to State taxes upon them, the courts say, "Lands which have been sold by the United States can in

no sense be called the property of the United States. They are no more the property of the United States than lands patented."

The land in question now forms part of a valuable sugar-plantation. It is respectfully submitted, that the decision of the court below ought to be reversed.

Mr. Henderson made the following points.

First Point. This case must be dismissed for want of jurisdiction, because the plaint is a libel or information by the District Attorney of the United States, filed in behalf of the United States, but not in the name of the United States, and filed in equity (not in admiralty). This in England, in behalf of the crown, might be proper. The "crown officer" proceeds officially and in his own name. Story, Eq. Pl. § 49 and § 8. But the United States have no such regal pretensions to be so represented.

"The judicial power shall extend to all cases in law and equity, ... to controversies, to which the United States shall be a party." Const. U. S., art. 3, § 2. And by the Judiciary Act of 1789, § 11, the jurisdiction of the Circuit Court of the United States at common law, or in equity, shall only be invoked by the United States when the value in dispute is equal to $500 or more, and they are "plaintiffs or petitioners."

By the act for the better organization of the Treasury Department, 15th May, 1820, § 1, the agent of the treasury is to "superintend all orders, suits, or proceedings in law or equity, for the recovery of money, chattels, lands, tenements, or hereditaments, in the name and for the use of the United States." See also § 7, same act.

By the act of 29th May, 1830, this agency is transferred to the Solicitor of the Treasury, but the manner of bringing suits remains unchanged. See §§ 3, 5, and 8.

Second Point. The case should be dismissed, because there is no appreciable value in the matter sought to be decreed by the prayer of the relator, as between the United States and the defendants. The United States do not claim the land, but only the surrender of a patent, for which Hughes gave $219.32, and which, as consequence, he would receive back if the patent was cancelled. Act of 1789, § 11.

Third Point. The case should be dismissed, because there is no authority, by any law of the United States, for the courts of the United States to repeal or cancel a patent for land sold by the government, when the United States, as in this case, show that they have neither land nor money to gain by such decree. In other words, it is shown the United States have no interest in this suit; but interpose only as an act of grace,

officiating only in the office of prerogative. Had Hughes defrauded the government of its lands, the United States would have the same right as a citizen to sue in equity to cancel our title. But a land patent (so called) for lands sold by the United States, is only a deed of bargain and sale. It has nothing of the grace or generosity of royal favor. It is in no legal sense a grant. But by acts of Congress of 2d March, 1833, § 1, and 4th July, 1831, § 6, the title issued is called a patent, whether for lands granted or sold; yet it is only in virtue of these qualities of grant that it is in England the prerogative of the crown to repeal patents. 5 Com. Dig., tit. *Patent* (F), pp. 280, 281.

But even there, if the same thing be twice granted, the *scire facias* to repeal shall be brought by the first patentee, and not by the king. Ibid. p. 281 (F. 4).

This prerogative is of the common law. But the United States have no right to such prerogative. 6 Pet. 35. And have no common law. 7 Cranch, 32; 8 Pet. 658; 3 How. 104.

The United States in selling land, and in all matters of contract, does not assert its sovereignty, but acts as a citizen. 9 Wheat. 907. Constitutional governments cannot pronounce their own deeds void for any cause. 6 Cranch, 132. They are estopped by their deed. 6 Cranch, 137. An innocent purchaser of a government may plead purchase for valuable consideration. 6 Cranch, 135.

It is against public policy, that the land-officers should elect their favorite between two citizens claiming the same land by purchase, and involve the United States as a partisan in the strife. And it is against the practice of the land-office. See President Jackson's Instruction, 2 Pub. Land Laws, no. 60, p. 93; Instructions 4 and 5, Opin. Attorney-General, Vol. II. no. 57, pp. 86 and 87; Ibid., no. 88.

And the act of 12th January, 1825 (Land Laws, 402), which directs that purchasers of land from the United States, where the purchase is void by reason of a prior sale, shall be entitled to repayment of the purchase-money, "on making proof, to the satisfaction of the Secretary of the Treasury, that the same was erroneously sold," clearly contemplates, that the purchaser shall establish the fact in some sufficient manner, and not that the department, as its duty, shall decide the fact, and force its judgment upon the purchaser.

And in this form of suit Hughes cannot litigate his rights with his co-defendants, nor can have any decree in his favor, but the dismission of this plaint; for which he, by his demurrer, and his co-defendants by answer, both pray.

Fourth Point. The fact is so, and the court, on inspection of the information filed, will not fail to perceive it, that the real

contestant parties to the property or title in issue are the co-defendants Sewall and Hudson on one side, and D. M. Hughes on the other. All are shown on the face of the bill to be residents of the State of Louisiana, viz. Sewall a resident on the land in controversy, Hudson an infant ward of the State, and Hughes a citizen of Red River. For such a case as this, no jurisdiction of parties in the Circuit Court of the United States obtains. And hence this case should be dismissed.

Fifth Point. If the United States, or their attorney, had a right to institute this suit (which we deny), yet no law of Congress can be produced to authorize an appeal by the United States in such a case; and, without direct legislation permits the appeal, none is allowed. 6 Peters, 494–497; 11 Peters, 166; 1 Howard, 265; 3 Howard, 104 and 317; 8 Howard, 121.

Nor is it shown that the matter in issue between the United States and defendants is of value $ 2,000. And hence the appeal should be dismissed.

Sixth Point. But if this court asserts jurisdiction of the cause, we nevertheless maintain the decree of dismission was right, not only for the causes shown in the points 1, 2, 3, and 4 preceding (which are all involved in the demurrer), but also that the merits of the case made in the bill are with the demurrant, because no valid right of preëmption is shown in Goodbee to the land patented to Hughes.

We might admit, without prejudice to our case, that what the land-officers have decided in favor of Goodbee's preëmption is conclusive against us so far as within their jurisdiction. But we maintain the allowance of this preëmption is most palpably without law, and against law. Omitting to note for the present, the numerous blunders of varied descriptions and misdescriptions of the lands in controversy, it is shown by the patent, Exhibit E, that the land sold to Hughes is Sec. 54, T. 10, R. 12, containing $175\frac{45}{100}$ acres. And this is the tract of land said by the bill, and by Exhibit D, to have been originally described as lot No. 1, but is subsequently correctly described as Sec. 54. We note, then, first, that this is an irregular section, which could only bear the number 54 by being a private claim, and from this cause having the accumulated number over the thirty-six sections which compose a township of the public surveys. Act of Congress, 18th May, 1796, § 2 (Land Laws, 50, 51); Act of 6th March, 1820, § 6 (Land Laws, 322). As an irregular section, and an entire section, it is fractional, including but 175 acres. The bill shows this preëmption was claimed and accorded under the fifth section of the act of 12th April, 1814 (Land Laws, 244), which extends the act of 5th February, 1813 (Land Laws, 226), to Louisiana. The claim,

then, in Louisiana must be under "the same restrictions, conditions, provisions, and regulations in every respect," as by act of 1813 is provided. Act of 1813, § 1, provides, "that no more than one quarter-section shall be sold to any one individual, in virtue of this act, and the same shall be bounded by the sectional and divisional lines," &c. See Secretary Crawford's Opinion, 2 Land Laws, 539, no. 478, that only a quarter-section is allowable. And § 2 requires that the applicant, in his notice of claim, "shall particularly designate the quarter-section he claims."

On the law, then, it is clear beyond doubt that the land-officers had no power or jurisdiction to grant preëmptions to entire sections, or fractional sections, or to any quantity exceeding a divisional quarter. And such was the construction of the Attorney-General, in 1814, of this act, on this point. 2 Land Laws, Op. no. 220 and no. 221. And the same construction of this act, when extended to Florida, by act of 22d April, 1826, is adhered to by the Attorney-General in 1826. See Op. no. 330. And the same principle is decided in Opinion no. 7.

These authorities seem quite conclusive that the allowance of this preëmption was against the plainest provisions of the law, and the direct instructions of the superior department, and therefore void. 3 How. 664, 665; 13 Pet. 519; 4 How. 502.

Seventh Point. The preëmption was void in its allowance, because before survey of the land, by which its number and subdivision could be known, or its allowance validated. 2 Land Laws, no. 399.

The bill affects to make it an equitable merit, that, when this application was made and allowed, neither the applicant nor the land-officers knew on which side the Bayou Goula this preëmption lay; and therefore it was assumed to lay on both sides, but "principally on the north side." That they did not know its number and sectional division, its contents and quantity, because it had not been surveyed. The argument in the bill, that these deficiencies resulted and continued from a delay to "connect the public surveys," is sheer nonsense. The connection of the surveys does not affect the actual surveys of the separate parcels and divisions. This manifest disregard of the law is seen in Exhibit B, which shows Goodbee's claim to be in the county of Iberville, on the Mississippi River, and for 160 acres exactly. There is no township, range, section, or quarter-section, nor the Bayou Goula, mentioned in this registry of preëmption. And Exhibits Nos. 1, 2, 3, 4, with Sewall and Hudson's answer, show that no particular lot or division was applied for or granted; but only "160 superficial acres," and this proven to lie on "both sides of the Bayou Goula." And

the application was expressly granted by the register, "subject to the sectional and divisional lines to be hereafter run." Is it wonderful, with such records of entry, that the land should apparently remain unsold?

But all this was palpably and expressly against the law of 1813, §§ 1 and 2, which distinctly requires that the land shall only be claimed or allowed after survey, and must be sought for and granted by its specific subdivisions. And see Instructions, 2 Land Laws, p. 384, no. 309.

Eighth Point. The alleged preëmption was clearly void, because not paid for by entry, &c. two weeks before the period assigned for the public sales, and therefore forfeited. Act of 1813, § 2.

It is unnecessary to inquire with what indulgence the land-office might have regarded the numerous and palpable violations of law which this preëmption encounters. It now rests on law, in contest with a purchaser who has paid his money and got a legal title, and who has a right to combat this alleged superior equity by any circumstance which may impair it. 7 Wheat. 6. We know not, on this demurrer, at what precise time this land was exposed to public sale; but, on the presumptions of law, Hughes could not have entered it as public lands, till after it was offered for sale at public outcry. Exhibit C shows us it was offered at public sale under the President's proclamation of 11th August, 1823. And these instructions or regulations were of like import with those of 1st January, 1836 (2 Land Laws, p. 125, no. 81), and which last was in force when Hughes purchased. And this court will presume what was required by the regulations to be done was in fact done. Therefore, this land was offered for sale on public notice, before Hughes bought it. And the bill shows, and Exhibit D shows, that this preëmption was not paid for till 3d April, 1846, being ten years after Hughes had entered and paid for it. Now, if Goodbee had a preëmption right in 1822 to this tract of land, the act of 1813, § 2, expressly forfeits it, if not entered before offered for sale (2 Land Laws, p. 112, no. 72; Ibid., p. 118, no. 77). And the price must all have been paid at the time of entry, by act of 24th April, 1820 (2 Land Laws, p. 384, no. 309). And if the land-officers had any power to indulge Goodbee for part payment of this land, it certainly could not lawfully extend to ten years after they had sold it to another, and for which delay no excuse is given; and it is not pretended the public surveys were not connected when Hughes purchased the land in 1836.

Ninth Point. This preëmption, as against Hughes, a purchaser with legal title, is void, also, for vagueness, misdescrip-

tion and uncertainty, and to which the acts of the claimant, more than those of the land-officers, contributed.

He had applied and paid for 160 superficial acres, lying on both sides of the Bayou Goula, which had no survey, boundary, sectional subdivision, quantity, township, or range, which could identify it, or give it specific location. Claimed as lying on both sides of Bayou Goula, and registered (see Exhibit B as lying on the Mississippi River, could Hughes, or any one, be admonished it lay on the north side of Bayou Goula? Claiming 160 acres and no odd hundredths or other excess, who was bound to know it was a tract of $175\frac{4\,6}{1\,0\,0}$ acres? Claimed and registered by some careless, unmeaning, and unauthorized designation of lot No. 1, who would suspect Sec. 54, T. 10, R. 12, was meant and intended by such description?

Now, on this demurrer, we claim to discriminate as to what the record was when Hughes purchased on the 14th of May, 1836, and what subsequent conjectures, annotations, and interlineations have made it.

There was, then, when Hughes purchased, no Sec. 54, T. 10, R. 12, assigned as Goodbee's preëmption, nor the Surveyor-General's commentary, of date 27th May, 1844, that Goodbee's 160 superficial acres had increased to $175\frac{4\,6}{1\,0\,0}$, as per Exhibit A. And Register Laidlaw had not then discovered, as he did in 1846, that the word "sold," written in the tract book, opposite to this designated lot, meant sold to Goodbee, rather than Hughes, who had purchased it ten years before this discovery. And the pencilled name of "Hudson," in 1836, in same book, but fairly implies that it was put there after Hughes bought the land the same year. But neither of these is so remarkable as that, Goodbee not having paid for the land up to date (1846), and with the averment in the bill that the "assigns" of Goodbee, on the 3d of April, 1846, paid up the arrearage due on this preëmption, yet the register gives his certificate of the same date, that Goodbee, on the 26th of February, 1822, purchased lot No. 1, *or* Sec. 54, T. 10, R. 12, containing $175\frac{4\,6}{1\,0\,0}$ acres, for which he made "payment in full, as required by law." While on the same date, as shown by the same Exhibit D, the receiver certifies that Goodbee, on the 3d of April, 1846, paid him $ 19.32, being residue in full for this same land. How much these post-dated certificates, contradictions, and transmutations of the records shall receive the sanction of the court, and, by their retrospective operation, conduce to deprive Hughes of his title, is submitted with but little apprehension as to the conclusions which must be arrived at.

The charges in the plaint, that Hughes falsely represented to the land-officers that this section was subject to entry, and

that he falsely represented he was entitled to have the patent, and thus obtained his title, we regard as meaning nothing available to the case, though met on demurrer. No presumption of law can be entertained that the land-officers acted on the verbal representations of Hughes, and were so childishly cajoled, instead of the evidences of their records, and the laws and instructions which guide them in like cases. Besides, Exhibit C expressly reports this land to have been offered at public sale, by the proclamation of the President, before Hughes purchased it. And to these acts, which were the prerequisites in law that put the land in market, Hughes is not charged with being accessory.

Mr. Justice CATRON delivered the opinion of the court.

The attorney of the United States for the District of Louisiana on behalf of the United States filed an information in the nature of a bill in chancery, against David M. Hughes, having for its object the repeal and surrender of a patent for $175\frac{46}{100}$ acres of land, made to Hughes by the President of the United States, April 16, 1841. The bill proceeds on the ground that said patent was fraudulently obtained, being in violation of the rights of Sewall and Hudson, deriving title from John Goodbee, who entered the land as his preëmption claim under the act of April 12, 1814, paid the purchase-money, and got a certificate of purchase, in 1822, for 160 acres; but when the public surveys were executed, the legal subdivision was found to contain $15\frac{46}{100}$ acres more, to which Goodbee's right of preëmption also extended.

The validity of Goodbee's entries depends on the regulations of the land-office, made in pursuance of statutes enacted by Congress; and which statutes and regulations are accurately set forth by the Attorney-General in his argument in this cause, and need not be further stated here.

It appears that in 1836 Hughes entered the same land, with full knowledge that those holding possession under Goodbee's title were owners and cultivating a sugar-plantation on it. The existence of Goodbee's preëmption right and better title was overlooked at the land-office in Louisiana, where the entry of Hughes was made; and again at the General Land-Office until after his patent had issued.

As the bill was demurred to, no dispute can be raised on the question of fraud, nor can any doubt exist that this second purchase was fraudulently obtained, Sewall and Hudson being notoriously in possession of the land as owners when Hughes made his entry at the land-office.

1st. The first and main objection made for defendant Hughes is, that this proceeding is improper, and will not lie.

It is to be regretted that this was not a simple bill in equity brought by the United States against the defendant Hughes, praying that the patent might be annulled and surrendered by a decree in chancery, without any attempt of assimilating the proceeding to an information brought by the Attorney-General on behalf of the crown, in England, to repeal a patent. In this country, the lands of the United States, lying within the States, are held and subject to be sold (under the authority of Congress), as lands may be held and sold by individual owners, or by ordinary corporations; and similar remedies may be employed by the United States as owners, that are applicable in cases of others. This, we think, is manifest. It was so held in the case of King et al. *v.* The United States, 3 How. 773.

In substance, this is a bill in equity for and on behalf of the United States, because of an injury done to the United States by Hughes, the defendant, and we will not dismiss it for want of form.

By the Constitution, Congress is vested with power to dispose of the public lands, and to make all needful rules and regulations respecting them. Under existing regulations, Goodbee had a right to enter the land in dispute in exclusion of others, and did so; and the United States, as owner, having been paid for the land, was bound to make the purchaser a title, in the same manner that an individual would have been bound under similar circumstances.

As the patent to Hughes is a conveyance of the fee, the United States stand divested of the legal title, and therefore cannot fulfil their engagement with Goodbee and his alienees, to whom they stand bound for a legal title, until the grant to Hughes is annulled.

It is manifest that, if the agents of an individual had been thus imposed on, the conveyance could be set aside because of mistake on part of such agents, and fraud on part of the second purchaser, in order that the first contract could be complied with. Nor can it be conceived why the government should stand on a different footing from any other proprietor.

Hughes has no right to complain, for so soon as it was discovered that he had defrauded the government, and those claiming under it, his purchase-money was tendered, and a surrender of the patent demanded; but he refused to receive the money, or surrender his legal advantage.

2d. The demurrer having been sustained, and the bill dismissed by the Circuit Court, it is insisted here that no appeal would lie, because the matter in dispute does not appear to have amounted to $2,000. All the assignments from Goodbee down to the present owners (Sewall and Hudson) are ex-

hibited with the bill, as a part thereof; the first of which is a notarial conveyance from Goodbee to Bush, dated in 1822. It states that the consideration of $2,000 had been paid for the land; and, there being a sugar-plantation on it, we assume its value to be quite equal now. As we are bound by complainant's allegation of value, no controversy can be raised on the fact. If, however, any objection existed, value could be proved here in like manner as is usually done in cases of ejectment, where there is no allegation what the property in dispute is worth.

We are of opinion that the patent to Hughes should be vacated and annulled; and accordingly order that the decree of the Circuit Court of the District of Louisiana be reversed; and it is adjudged and decreed, that the patent made to David Michael Hughes by the President of the United States, on the 16th day of April, A. D. 1841, for 175$\frac{4}{100}$ acres of land, being for section 54 in township 10 of range 12 east, in the district of lands subject to sale at New Orleans, Louisiana, be, and the same is hereby, vacated, and declared null and void. And it is also ordered and decreed, that said David Michael Hughes do, within one calendar month from the time of filing and entering the mandate of this court in the Circuit Court for the District of Louisiana, surrender said patent to the clerk of the aforesaid Circuit Court, who will certify on its face that said patent is annulled by this decree; which certificate he will sign and further authenticate under the seal of his court, and then forward said patent to the Commissioner of the General Land-Office at Washington city.

And it is further adjudged and decreed, that said David Michael Hughes be, and he is hereby, for ever enjoined from prosecuting any suit in law or equity on said patent, as evidence of title.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed; and this court, proceeding to render such decree as the said Circuit Court ought to have rendered, doth order, adjudge, and decree, that the patent made to David Michael Hughes by the President of the United States, on the 16th day of April, A. D. 1841, for section 54 in township 10 of range 12 east, in the district of lands subject to sale at New Orleans, Louisiana, containing 175$\frac{4}{100}$ acres of

land, be, and the same is hereby, vacated and annulled; that the said David M. Hughes do, within one calendar month from the time of filing the mandate of this court in the said Circuit Court, surrender said patent to the clerk of said court; that the said clerk shall certify under the seal of the said court, on the face of the said patent, that it is annulled by this decree, and then transmit the same to the Commissioner of the General Land-Office at Washington city; that the said David M. Hughes be, and he is hereby, for ever enjoined from prosecuting any suit in law or equity on said patent as evidence of title. And it is further adjudged and decreed, that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to carry this decree into effect, and for such further proceedings to be had herein, in conformity to the opinion of this court, as to law and justice may appertain.

THE UNITED STATES, APPELLANTS, *v.* THOMAS POWER'S HEIRS.

The twelfth section of the regulations of O'Reilly in 1770 required, that there should be an order of survey, a proces verbal by the surveyor of the province, three copies of the plat made out by him, one of which should be deposited in the office of the scrivener of the government, and Cabildo, a second delivered to the governor, and the third to the proprietor, to be annexed to the titles of the grant.

Where a grant was alleged to have been issued by the Spanish governor of Louisiana in 1781, and the only evidence of it was a copy taken from a notary's book, the title was invalid.

At the date of the grant, viz. 1st August, 1781, the Spanish governor of Louisiana was only the military commandant of that part of West Florida in which the lands granted were situated. He held the country by right of conquest. The Spanish laws had not been introduced into the country, and it was not ceded to Spain by Great Britain until 1783. The governor had therefore no authority to grant land in 1781.

Under the acts of Congress of 1824 and 1844, the District Court had no power to act upon evidence of mere naked possession, unaccompanied by written evidence, conferring, or professing to confer, a title of some description.

Under the various acts of Congress relating to land titles in that tract of country between the Iberville, the Perdido, and the thirty-first degree of north latitude, a complete title, unrecorded, is not barred against the United States, although it is barred against any private claim derived from the United States.

THIS was an appeal from the District Court of the United States for the Southern District of Mississippi.

It was the case of a petition, and amended petition, presented by the heirs of Thomas Power to the District Court for the Southern District of Mississippi, the first on the 15th of June, 1846, and the latter on the 11th of November, 1846, under the act of 1824, as revived and reënacted by that of 1844, claiming two very valuable islands, lying off the coast of the State of Mississippi, opposite the Bay of Biloxi.

The petition and amended petition, in substance, set forth, that, before the year 1760, Deer Island was occupied, with the verbal consent of the provincial authorities, by Pierre Laclede and Pierre Songy, who, on the 11th of September, 1760, sold all their rights to André Jung; that on the 7th of March, 1761, the said Jung made a similar sale to Ignace Brontin; and that, on the 8th of April, Brontin sold all his rights to Francisco Caminada.

That afterwards, on the 1st of August, 1781, Caminada received a grant of the said island called Deer Island, and another called Ship Island, from Bernardo de Galvez, then Spanish governor of Louisiana, which, it is alleged, then extended to the east beyond the said islands, as follows, viz.: —

"Don Bernardo de Galvez, Knight Pensioner of the royal and distinguished Spanish Order of Charles the Third, Colonel of the Royal Army, Governor, Intendant, and Inspector-General of the Province of Louisiana, &c., &c.

"Considering the foregoing acts performed by Don Francisco Caminada, which establish the right of possession which he has to the two islands, Deer and Ship, situated in front of the coast of Biloxi, recognizing them to have been made out agreeably to the order of survey, without causing prejudice to the neighbors adjoining, and without any opposition on their part; on the contrary, yielding, as it appears, their assistance to the said acts, approving them as we do approve them, therefor using the authority which the king has confided to us (*otorgamos*), we grant in his royal name, to the said Don Francisco Caminada, the possession of the aforesaid two islands, Deer and Ship; that as his own property he may dispose of them, and enjoy them, governing himself by said acts, and observing in every thing that which has been ordered for the settlement of the subject-matter.

"We give these presents, signed with our hand, sealed with the seal of our arms, and countersigned by the undersigned Secretary of his Majesty for this government.

"In New Orleans, on the 1st day of August, 1781.

"BERNARDO DE GALVEZ.

"By order of his Excellency.

"MANUEL ANDRES LOPEZ DE ARMESTO.

"Registered in book of records for said object, in the archives of my office, at folio 14. New Orleans, November 8th, 1781.

"LEONARD MARANGE, *Notary.*"

The above, being a notarial copy, was the only evidence exhibited of the grant. The original was lost.

The petition further stated, that on the 2d of December, 1806, Prosper Prieur, acting as the testamentary executor of Caminada, sold the two islands to Thomas Power, to whom the petitioners are heirs.

The amended petition further stated, that Caminada was an inhabitant of Louisiana, where he lived and died; that the Surveyor-General of Mississippi, acting under instructions of the Treasury Department, was executing, by a deputy, a survey of the islands, which had not been completed; but Deer Island was estimated to contain about two thousand acres, and Ship Island three thousand acres; that the petitioners had no knowledge or information of any adverse claim of title, save and except transient and temporary squatters, who from time to time had occasionally occupied parts of each island; and that they had no knowledge or belief that the title was ever presented by their ancestor to any board of commissioners whatever.

To this petition the district attorney filed his answer on the 13th of January, 1847, and insisted that the original petition was not filed within the time limited by the act of 1824 and the act of 1828 amendatory thereto; and that, the amended petition not having been filed until the 11th of November, 1846, the petitioners were barred and precluded from the institution of any suit against the United States, who relied upon the act of Congress of 1828 as limiting the right to one year. But if it should be decided that the limitation was two years, as provided in the act of 1824, they still insisted that the claim was barred, the amended petition not having been filed within two years from the passage of the act of 1844. The answer further denied the grant to Caminada in 1781, and the sale by his testamentary executor to Power. But if ever such a sale was made, they denied the right of the executor to make it, or to divest the rights of the heirs of Caminada, or pass any title to Power. They know nothing of the sale from Laclede and Songy to Jung, or of the sale to Caminada, and they required proof of the identity and rights of the parties claiming. They further denied that, at the time of the alleged grant in 1781, Caminada was an inhabitant of Louisiana, or that he lived and died there, or that any order of survey was executed for Caminada previous to the date of said alleged grant. The answer further stated, that the allegations in the petition and amendment were not sufficient, if true, to authorize a decree against the United States, and claimed the benefit of this objection in the same manner as if it had been relied upon by a demurrer.

Documents were filed and evidence was taken, but it is not material to state the substance of either.

In November, 1848, the District Court decreed, "that the claim and title of the petitioners to the two islands or parcels of land as before described be, and the same are hereby, confirmed to them in full property, the said original grant or title, in the opinion of said court, being good and valid, in virtue of the patent therefor, and in virtue of the treaty of St. Ildefonso, between Spain and France, of date October, 1800, and of the treaty of Paris of 1803, for the cession of Louisiana to the United States, and by the laws of nations, and by the acts of Congress hereinbefore referred to, under which this court has cognizance of said case.

"And it is further adjudged and decreed, that, the two several islands aforesaid having each its natural boundary, a survey thereof is therefore dispensed with, and that the petitioners' title be confirmed to them in the whole extent of the natural boundaries of said islands respectively; and if, on investigation, it shall appear that the United States has heretofore made sale of all or any part of said islands, then, as to such sales, the title hereby confirmed shall stand qualified and inoperative as to the specific land so sold, and, in place and stead of the land so sold, the petitioners shall be permitted to enter a like quantity of land within the same land district, which may be subject to sale at private entry."

The United States appealed to this court.

The appeal was argued by *Mr. Crittenden* (Attorney-General), for the appellants, and submitted upon printed argument by *Mr. Henderson*, for the appellees.

Mr. Crittenden contended that the decree must be reversed, for the following reasons.

I. That on the 1st of August, 1781, the date of the alleged grant, Governor Galvez had no authority to make the grant of Ship Island and Deer Island to Caminada, the cession by Great Britain to Spain of that part of the country where they lie not having been made until the definitive treaty of peace of the 3d of September, 1783.

By the treaty of peace of 1763, between Great Britain, France, and Spain, it was agreed between France and Great Britain, "that, for the future, the confines between the dominions of his Britannic Majesty and those of his most Christian Majesty, in that part of the world, shall be fixed irrevocably by a line drawn along the middle of the River Mississippi, from its source to the River Iberville, and from thence by a line drawn along the middle of this river and the Lakes Maurepas and Pontchartrain to the sea; and for this purpose the most Chris-

tian king cedes in full right, and guarantees to his Britannic Majesty, the river and port of Mobile, and every thing which he possesses, or ought to possess, on the left side of the River Mississippi, with the exception of the town of New Orleans, and of the island in which it is situated, which shall remain to France." 2 Clark's Land Laws, Appendix, 258.

War having been declared by Spain against Great Britain, in 1779, Galvez proceeded with a considerable force to invade the British territory, and on the 14th of March, 1780, Fort Charlotte, on Mobile River, capitulated to him. Pensacola also afterwards capitulated to him, on the 9th of May, 1781.

The treaty by which Great Britain ceded the Floridas to Spain is dated the 20th of January, 1783.

The authorities to sustain the proposition are, 1 Kent, 169; Wheat. Elements, 572; Clark *v.* U. States, 3 Wash. 104; U. States *v.* Hayward, 2 Gallis. 501; Polk's Lessee *v.* Wendell, 9 Cranch, 99; Poole *v.* Fleeger, 11 Peters, 210; U. States *v.* Reynes, 9 Howard, 127; Davis *v.* Police Jury of Concordia, Ibid. 280; U. States *v.* Heirs of D'Auterive, 10 Howard, 609, decided the present term.

II. That there is no sufficient evidence of the execution of the alleged grant by Galvez, and, even if it were proved, the claim under it cannot be recognized, because the said alleged grant was not presented and recorded in pursuance of the fourth section of the act of the 25th of April, 1812, entitled "An act for ascertaining the titles and claims to lands in that part of Louisiana which lies east of the River Mississippi and island of New Orleans." 2 Stat. at Large, 715.

III. That if the grant to Caminada were valid, the petitioners have shown no title under it in Thomas Power, or in them as his heirs, as required by the act of 1824. The deed by Prieur to Power is not proved, and if it were, it is not shown that Prieur had any authority to make it.

IV. That the petitions were not filed within the time limited by law, and should have been dismissed.

Mr. Henderson, for the defendants in error, made the following points.

First Point. The title of petitioners rests on a full, complete, and perfect grant, — a patent, the original of which is filed in this case, and is sixty-nine years old. It was, and is, effective against all private persons, without further confirmation by the United States; and when, as now, rightfully exhibited against the United States, is equally valid against them, as perfect evidence of private property; and though a full legal title, — a "Spanish grant," — is within the direct cog-

nizance of the first section of the act of 1824, and the proper subject of this statutory jurisdiction in equity. 9 Peters, 733.

Second Point. The title, out of the United States, being perfect, legal, and indefeasible, the only question remaining is the right of the petitioners to that title.

Our first position on this point is, that the United States have no right or jurisdiction to try the question of title between the heirs of Caminada, the grantee, and the heirs of Power, who claim as assignees of the grantee. That, while it may be a matter of judicial propriety that the United States should require a *primâ facie* showing by the petitioners that they properly represent the "claim" in controversy, yet they have no right to demand an issue to try that question as between parties not before the court. It is for the United States, under the law of 1824, to test the validity of the claim, and ascertain if the land in controversy is private property. The State tribunals, where the lands lie, will adjudge the title between its citizens. This inquiry cannot be thus incidentally invoked. 13 Peters, 375; 17 Louisiana, 479.

But, as the attorney of the United States in the court below pressed this issue upon us, it may be necessary we should sustain it here. It involves the inquiry, that, as the petitioners claim title by a notarial act of conveyance, made to their ancestor in New Orleans, in 1806, by Prosper Prieur, as testamentary executor of Caminada, of the lands in question, is there proof enough in this case, in the absence of direct evidence of the last will of Caminada, and of Prieur's appointment to administer it, to sustain Prieur's act of sale to Power?

And on this point we assume, that this act, being notarial and authentic, is *quasi* judicial, and will be presumed to have been done by proper authority. 9 Pet. 625; 3 Har. & McHen. 594; 6 Greenleaf, 145; Civil Code of Louisiana, 2233. And at the date of this sale in 1806, the *locus in quo* formed part of the "Territory of Orleans."

And next, that this conveyance, being now forty-four years old, requires no proof to authenticate its due and proper execution, and that this rule of presumption of the due execution of the deed necessarily includes all the concomitant prerequisites to its execution. 1 Greenleaf's Ev. § 21, § 144; 14 Mass. 257; 6 Greenleaf, 145; 14 Johns. 182; 10 Ib. 475; 9 Ib. 169; 2 Hawks, 233; 3 Har. & McHen. 594; 7 La. 370; 2 How. Miss. 819; 5 Ib. 586; 6 Sm. & Mar. 284; 2 Rob. La. 84, 85; 1 Stark. Ev. 331, 332, note; 2 Stark. 924, notes 1, 2; 4 Wheat. 221; 7 Pet. 266; 2 How. U. S. 316; 7 Sm. & Mar. 159; 9 Pet. 674.

Third Point. But if the presumptions of law in favor of the deed, from its age, &c., were not sufficient, we have, by the tes-

timony of Johnson and Janin, proved sufficient search for the mortuary proceedings on Caminada's estate, to lay the foundation of the secondary proof we have offered. 1 Greenl. Ev. § 84, and notes; 6 Greenl. 145; 14 Johns. 182. And we suppose the testimony of these witnesses, as to the lost record,—whereon the Spanish governor (the highest judicial officer of the province) had several times, by his signature, recognized the executorial capacity of Prieur,—and the abstract of the record filed with Johnson's deposition, quite satisfactory, as secondary evidence, that Prieur was in verity the executor of Caminada.

And as between Caminada's heirs and the heirs of Power, the title of the latter is now good by prescription. Power's heirs claim title, with the original grant in possession. This claim of title of unimproved lands draws after it possession commensurate with the grant. 2 Lomax's Dig. 132; 7 Sm. & Mar. 130.

So that their possession, and that of their ancestor, is now of forty-four years' continuance, without contest or molestation.

For all these reasons, we conclude the title derived by Thomas Power from the estate of Caminada is good and valid in this respect, and hence good to the extent claimed.

Mr. Justice CATRON delivered the opinion of the court.

In this case the petition sets forth that, before the year 1760, Deer Island was occupied, with the verbal consent of the provincial authorities, by Pierre Laclede and Pierre Songy, who on the 11th of September, 1760, sold their right of property thereof, and the improvements thereon, to Andre Jung; and that he made a similar sale to Ignace Brontin; that said Brontin sold the same to Francisco Caminada, who for a great length of time thereafter occupied said island; and that in 1806 Prosper Prieur, acting as the testamentary executor of Caminada, sold to Thomas Power, ancestor of complainants, two islands, known as Deer and Ship Islands, for which two islands Francisco Caminda received a complete grant, August 1st, 1781, from Bernardo de Galvez, then Spanish governor of the Province of Louisiana.

The answer denies all these facts, and requires proof.

This claim was presented to the District Court for the first time, never having been laid before a board of commissioners, or any step taken in regard to it, previously to its exhibition with the petition, June 15th, 1846.

In the District Court it was held that the grant for both islands was valid, and a decree was rendered against the United States.

No evidence was introduced to prove that such grant had been made, other than a Spanish copy certified by a notary, from the Spanish records in his office. The notarial record purports to have been made November 8th, 1781. This copy recites that it was founded on a petition of Caminada, asking for the grant in consideration of acts performed by him; and was made out agreeably to an order of survey and proces verbal, with the assent and assistance of the neighbors; which survey and proces verbal the governor approves, and on these proceeds to grant.

Assuming that the Spanish regulations had been adopted in Florida, then the rule governing surveyors, existing in 1781, is found in the twelfth regulation of O'Reilly of 1770. It requires the acts to be done which are recited in the grant, and directs that three copies shall be made of the plot and proces verbal by the surveyor of the province, one of which shall be deposited in the office of the scrivener of the government, and Cabildo; another shall be delivered to the governor, and a third to the proprietor, "to be annexed to the titles of the grant."

Nothing of the kind here appears. The only evidence is, that the grant was recorded on the notary's books, whether in the proper office, to which a copy of the plan of survey and proces verbal should have been returned, according to O'Reilly's regulation, does not appear, although we suppose it was the proper office, where one copy should have been deposited by the surveyor; yet no authority existed for recording the grant there, so far as we are informed: and if there had, no complete title was recorded, as such title had to be accompanied by the plot and proces verbal, describing the land granted. On this unsupported and mutilated copy alone the decree of the District Court is founded.

Our next inquiry is, whether Galvez, who purports to have made the grant, had power to do so on the 1st of August, 1781.

1. By the laws of nations, in all cases of conquest, among civilized countries, having established laws of property, the rule is, that laws, usages, and municipal regulations in force at the time of the conquest remain in force until changed by the new sovereign. And this raises the question of fact, whether the king of Spain had changed the laws of England existing in the province, by virtue of which the public domain could be granted to private owners, as early as August 1st, 1781, and in their stead adopted the laws of Spain prevailing in Louisiana; as, if the Spanish king had not done so, his officers had no power to grant. Having nothing to govern us in ascertaining this fact but the history of Florida and of its conquest by Spain, it becomes necessary to examine that history, in so

far as the same may be judicially noticed, and has any bearing on the claim before us.

It was first discovered, inhabited, and governed by France as part of Louisiana, and by that power ceded to Great Britain. By the treaty of peace of 1763, the boundary between France and Great Britain was declared to be through the Iberville, Lakes Maurepas and Pontchartrain, to the sea; and the French king ceded the river and port of Mobile, and every thing he possessed on the left side of the River Mississippi, with the exception of the town of New Orleans and the island on which it is situated. Deer and Ship Islands were therefore included in this cession to Great Britain.

The king of Spain, by another article of the same treaty, ceded to Great Britain Florida, with the fort of St. Augustine and the Bay of Pensacola, as well as all that Spain possessed on the continent of North America to the east or southeast of the River Mississippi.

In 1763 the king of Great Britain by proclamation created the governments of East and West Florida. The government of West Florida was bounded to the southward by the Gulf of Mexico, including all islands within six leagues of the coast, from Appalachicola to Lake Pontchartrain; to the westward by the Mississippi, Lakes Pontchartrain and Maurepas; to the north by the thirty-first degree of north latitude; and to the east by the River Appalachicola. In 1764, the northern line of Florida was extended by Great Britain from the Appalachicola, at the thirty-first degree, to the mouth of the Yazoo, on the Mississippi River.

Unzaga, having been appointed Captain-General of the Caraccas, was, by a royal schedule of the 10th of July, 1776, directed to surrender provisionally the government and intendancy of Louisiana to Bernardo de Galvez, colonel of the regiment of Louisiana.

Spain having declared war against Great Britain on the 8th of May, 1779, on the 8th of July following a royal schedule was issued, authorizing the Spanish subjects in the Indies to take part in the war.

With the official account of the rupture, Galvez, who had hitherto from July 1, 1777, exercised the functions of governor *pro tempore*, received the king's commission of governor and intendant. The commission is dated 8th May, 1779, the day of the declaration of war, and is confined to the Province of Louisiana.

Galvez, on receipt of this commission, determined to attack the British possessions in his neighborhood, and accordingly did so. On the 21st of September, 1779, Baton Rouge, Natchez,

and other posts in the same part of the country, capitulated to him.

His success was rewarded by a commission of brigadier-general, 1780.

Early in January, 1780, he proceeded to attack Fort Charlotte, on the Mobile River, which capitulated, 14th March, 1780. Shortly afterwards he proceeded to attack Pensacola, but his transports having been dispersed, and some of them lost by a storm, he went back to Havana, whence he had set out.

In 1781, he was promoted to the rank of *mariscal de campo.*

On the 28th of February, 1781, he left Havana, again to attack Pensacola, and on the 9th of March landed his troops, and on the 9th of May the British forces capitulated. By express terms of the capitulation, the whole province of West Florida was surrendered to Spain; Don Arthur O'Neil, an Irish officer in the service of Spain, was left in command at Pensacola.

The alleged grant by Galvez to Caminada bears a subsequent date, viz. New Orleans, 1st August, 1781; less than three months after the capitulation of Pensacola.

In the caption of the grant, Galvez is styled Colonel of the Royal Army, Governor and Intendant of the Province of Louisiana.

Mazange, who certifies the copy as registered in his office, was appointed clerk of the Cabildo, 1st January, 1779, and held the office until January, 1783.

The preliminary articles of peace between Spain and Great Britain were signed at Paris, 20th January, 1783. By the third article it is stipulated that "his Britannic Majesty will cede to his Catholic Majesty East Florida, and his said Catholic Majesty will retain West Florida."

At the date of the grant, Spain held in military occupation the country to the east of the island of Orleans, under the capitulation of Pensacola, liable to be divested by reconquest or surrender by a treaty of peace.

Nothing is found in these historical details indicating that the Spanish laws had been introduced into Florida, and superseded those of England, and that civil power had been vested in Galvez to grant lands. As this could only be done directly by the king, all presumptions are opposed to such supposition. The grant purports to have been made within eighty days after the capitulation of Pensacola; a time, at that day, hardly sufficient to have heard from Spain, after the account of the capitulation reached there, had there been no hostile British fleet intervening to intercept intercourse. But what would seem to be conclusive of the fact is, that Galvez did not assume to grant

by any new authority, but did so under his commission as governor of Louisiana; and as this bore date before the conquest, and did not extend to Florida, no such power could be exercised by force of that commission. And not having power to grant merely as a military officer in command, the grant could not be made by him, and is void. Nor can we suppose that Galvez made any grant of the date of August 1, 1781, as such assumption would be a reproach on his high standing and intelligence.

2. The grant having no force, the next question is, whether complainants have shown any equity entitling them to a decree. As to Deer Island, it is alleged that those under whom Caminada claimed had possession by verbal permission from government for many years under France and Great Britain. But no proof of the fact was made; and if there had been such proof, it would be of no value, as the District Court did not possess power to act on evidence of naked possession unaccompanied by written evidence conferring, or professing to confer, a title of some description.

As respects Ship Island, it is not pretended that any equitable claim to it existed antecedent to the date of the grant.

3. If we had found this to be a legal and perfect title, then the rule laid down in the case of Reynes, at the last term, would apply, and compel us to dismiss the petition for want of jurisdiction, because the act of 1824 did not confer power on the District Courts to decide on perfect grants; but as a mutilated title-paper is here set up, unaccompanied by a plan of survey and proces verbal, which the grant refers to as a part thereof, and as an equity standing in advance of the grant is relied on by the petition to one of the islands, it is our duty to act on the mutilated title, and on the assumed equity, and ascertain whether the claim as set forth by complainants can be sustained.

We cannot declare in advance, that there is no equity in the pretensions set up by complainants, as the act of 1824 imposes on us the duty "to hear and determine all questions arising in the cause relative to the title of the claimants"; that is to say, in all cases where the title was not perfect according to the laws of Spain, when our government acquired Louisiana, and by a final decree to settle and determine the question of validity of title. And this must be done, regardless of the fact whether the equity set up be weak or strong in our judgment.

In the case of Reynes there was a perfect and formal Spanish grant set forth by complainant, and admitted to exist as set forth by the United States; and the only question was, whether jurisdiction in the Spanish government was wanting over the

country where the land lies at the time the grant bears date. No question arose on the face of that title, but on the extraneous fact, that the land lay beyond the Spanish jurisdiction. The cases are widely different.

4. It was earnestly insisted in argument, that this claim is barred, because it had not been recorded as prescribed by Congress. And as this question is prominently presented in the record, and has been fully examined, it is deemed proper to decide it.

By the first section of the act of the 26th of March, 1804 (1 Land Laws, 112), "all that portion of country ceded by France to the United States under the name of Louisiana which lies south of the Mississippi Territory, and of an east and west line to commence on the Mississippi River at the thirty-third degree of north latitude and to extend west to the western boundary of the said cession, shall constitute a territory of the United States under the name of the Territory of Orleans."

The limits to the east from the Mississippi River extended to the Perdido, that river having been claimed by the United States as the boundary of Louisiana on the east from the execution of the treaty of cession.

By the act of the 2d of March, 1805 (1 Land Laws, 122), "An Act for ascertaining and adjusting the titles and claims to land within the Territory of Orleans and District of Louisiana," the Territory of Orleans was to be laid off into two districts, in such manner as the President should direct, in each of which he should appoint a register, who, together with two other persons to be by him also appointed, should be commissioners for the purpose of ascertaining the rights of persons claiming under any French or Spanish grant, or under the first two sections of the act. The first section applies to claims under any duly registered warrant or order of survey obtained from the French or Spanish government. The second applied to persons who, with permission of the proper Spanish officer, and in conformity with the laws, usages, and customs of the Spanish government, had made an actual settlement on a tract of land not claimed by virtue of the preceding section.

The act further provides, that every person claiming lands by virtue of any legal French or Spanish grant made and completed before the 1st of October, 1800, may, and every person claiming lands by virtue of the first two sections of the act, or by virtue of any grant or incomplete title bearing date subsequent to the 1st of October, 1800, shall, before the 1st of March, 1806, deliver a notice to the register stating his claims, together with a plat, and deliver to the register for the purpose of being recorded every grant, order of survey, deed, convey-

ance, or other written evidence of his claim. Provided that, where lands are claimed by virtue of a complete French or Spanish grant, it shall not be necessary to have any other evidence recorded except the original grant or patent, and the warrant, or order of survey, and the plat, but the other evidence should be deposited with the register; " and if such person shall neglect to deliver such notice in writing of his claim, together with a plat as aforesaid, or cause to be recorded such written evidence of the same, all his right, so far as the same is derived from the two first sections of this act, shall become void, and thereafter for ever be barred; nor shall any incomplete grant, warrant, or order of survey, deed of conveyance, or other written evidence which shall not be recorded as above directed, ever after be considered or admitted as evidence in any court of the United States against any grant derived from the United States."

This last provision does not apply to complete titles, (as Caminada's assumed to be,) but to claims under incomplete titles, and claims arising from possession and cultivation under the first and second sections of the act.

It is not very clear what was comprehended within the limits fixed by the President as the eastern district. In a letter from the Secretary of the Treasury to the register at New Orleans, dated 30th March, 1805 (2 Land Laws, 666), it is said, " for the present all that part of the territory which lies east of the Mississippi," together with certain parishes on the west bank, will belong to the eastern division.

By the third section of the act of the 2. st of April, 1806, supplementary to the act of 1805 (1 Land Laws, 139), the time fixed for delivering notices and evidences of claims is extended to the 1st of January, 1807, but the rights of persons neglecting shall be barred, and the evidences of their claims never afterwards admitted as evidence, in the same manner as had been provided by the fourth section of the act of 1805.

This provision, therefore, only applied to incomplete titles and claims under possession and cultivation, and not to complete grants.

By the fifth section of the act of the 3d of March, 1807 (1 Land Laws, 153), " An Act respecting claims to land in the Territories of Orleans and Louisiana," the time for delivering notices and evidences of claims was further extended till the 1st of July, 1808, but the rights of persons neglecting, " so far as they are derived from, or founded on, any act of Congress," shall ever after be barred and become void, and the evidence of their claims never afterwards be admitted as evidence in any court

of law or equity whatever. This provision, also, it will be seen, did not touch complete grants.

By the act of the 23d of April, 1812, "An Act giving further time for registering claims to land in the Eastern District of Louisiana," persons (actual settlers on the land which they claimed) were allowed until the 1st of November, 1813, to deliver notices and evidences of their claims, with the same provision as to neglect as in the act of 1807.

Complete grants were therefore still untouched.

It is proper here to mention, that, in the summer of 1810, a number of citizens of the United States, who had removed to the neighborhood of Bayou Sarah, took the fort of Baton Rouge from the Spanish authorities, and, in a convention which afterwards met, declared their independence and framed a constitution.

Upon receiving information that the Spanish troops had been driven from Baton Rouge, Mr. Madison, then President, issued a proclamation on the 16th of October, 1810, setting forth that the territory south of the thirty-first degree of north latitude east of the Mississippi as far as the Perdido, of which possession had not yet been delivered to the United States, had ever been considered and claimed by them as part of the country they had acquired by the treaty of 1803. He therefore announced that he had deemed it right and necessary that possession should be immediately taken of the said territory in the name and behalf of the United States, and the governor of the Territory of Orleans was directed to carry the views of the United States into execution. Governor Claiborne accordingly did so, and on the 7th of December, 1810, hoisted the flag of the United States at St. Francisville, without opposition, and announced the event by a proclamation, and subsequently established in this new part of the Territory of Orleans the parishes of Feliciana, East Baton Rouge, St. Helena. St. Tammany, Biloxi, and Pascagoula.

No attempt was made to occupy the town of Mobile, nor any part of the country around it, and the Spanish garrison of Fort Charlotte was left undisturbed; Governor Claiborne having been specially instructed not to take possession by force of any post in which the Spaniards had a garrison, however small it might be.

By an act of the 12th of February, 1813, the President was authorized to occupy and hold all that tract of country called West Florida not now in possession of the United States. 3 Stat. at Large, 472.

In pursuance of this act, possession was taken, by order of the President; the governor of Louisiana having done so by the President's directions.

These proceedings having placed the United States in the actual possession of West Florida as far as Mobile, Congress on the 25th of April, 1812, passed "An Act for ascertaining the titles and claims to lands in that part of Louisiana which lies east of the River Mississippi and island of New Orleans." 1 Land Laws, 208. By the first section of this act it is enacted, that for the purpose of ascertaining the titles and claims to land in that tract of country which lies south of the Mississippi Territory, east of the River Mississippi and island of New Orleans, and west of the River Perdido and a line drawn with the general course thereof to the southern boundary of the Mississippi Territory, the lands within the said limits shall be laid off into land districts between which Pearl River shall be the boundary, and for each of which districts a commissioner shall be appointed.

By the fourth section it is enacted, that every person claiming lands in the said tract of country, by virtue of any grant, order of survey, or other evidence of claim whatsoever, derived from the French, British, or Spanish governments, shall deliver to the commissioner a notice in writing, stating the nature and extent of his claim, together with a plat, and shall deliver to the commissioner, for the purpose of being recorded, every grant, order of survey, deed, conveyance, or other written evidence of his claim, and the same shall be recorded. "Provided that, where lands are claimed by virtue of a complete French, British, or Spanish grant, it shall not be necessary for the claimant to have any other evidence of his claim entered at large on the record, except the original grant or patent, together with the order of survey and the plat; all the other conveyances or deeds may be abbreviated in the entry, but the chain of title and the date of every transfer shall appear on the record. And if such person shall neglect to deliver such notice in writing of his claim, together with the plat (in case the lands claimed shall have been surveyed), as aforesaid, or cause to be recorded such written evidence of the same within the time and times as aforesaid, his claim shall never after be recognized or confirmed by the United States; nor shall any grant, order of survey, deed, conveyance, or other written evidence, which shall not be recorded as above directed, ever after be considered or admitted as evidence in any court of the United States against any grant which may hereafter be derived from the United States."

The plain meaning of this provision is, that no Spanish claim not recorded shall be evidence in cases where the same land has been granted by the United States, and a contest arises between the two grants.

This act, it is apprehended, is the first provision under which the grant to Caminada could have been brought forward; as at the time of its passage the United States had come into actual possession of the country where the islands are situated.

By the act of 18th April, 1814, supplementary to the act of 1812, the time for delivering notices and evidences of claim was extended to the 1st of September, 1814. 1 Land Laws, 247.

The act of 3d March, 1819, "An Act for adjusting the claims to land and establishing land-offices in the districts east of the island of New Orleans," confirms claims reported under the act of 1812, and confers on the registers and receivers of Jackson Court-House and St. Helena Court-House the same powers as the commissioners east and west of Pearl River had. By the sixth section it is declared, that every person claiming land, whose claims had not before been filed, "shall be allowed until the 1st of July, 1820, to deliver notices in writing and the evidences of their claims to the register of the land-office at Jackson Court-House and at St. Helena Court-House, and the notices and evidences so delivered within the time limited by this act shall be recorded in the same manner as if the same had been delivered before the commissioners closed their said registers."

By the act of 24th May, 1828, "An Act supplementary to the several acts providing for the adjustment of land claims in the State of Mississippi," it is provided, that claimants of lands within that part of the limits of the land district of Jackson Court-House below the thirty-first degree of north latitude, whose claims had been presented to the commissioners or to the register or receiver under the act of 3d March, 1819, which had not been reported to Congress, or had not been presented to the said commissioners or register and receiver, were allowed to the 1st of January, 1829, to present their titles and claims to the register and receiver at Jackson Court-House, whose powers and duties shall be, in relation to the same, governed by the provisions of the acts before recited, and of the act of 8th May, 1822.

Although the act of 1812 is not directly cited in the act of 1828, yet it was meant to be included, as it was under that act that the first commissioners were appointed. The register and receiver were appointed under the act of 1819. Neither the act of 1812, nor any succeeding act, barred a claim to land not surveyed and sold by the United States; and Ship and Deer Islands remaining unsold, the claim before us stands unaffected by the legislation of Congress. That such was the obvious understanding of Congress when the act of 1824 was passed, under which we are exercising jurisdiction, appears by

the eleventh section of that act. It protects purchasers under the United States, but not the government itself, as to any lands not surveyed and sold.

But aside from this consideration, for the reasons previously stated, we adjudge the claim to be invalid, and order the petition to be dismissed.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby, reversed and annulled, and that this cause be, and the same is hereby, remanded to the said District Court, with directions to dismiss the petition of the claimants

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ISAAC LARMAN, PLAINTIFF IN ERROR, *v.* JAMES TISDALE'S HEIRS.

The fifty-fourth rule of this court, requiring an appearance to be entered on or before the second day of the term next succeeding that at which the case is docketed, does not include an adjourned term; but applies only to regular terms.

MR. STANTON, of counsel for the defendants in error, moved the court, on the 28th of February, 1851, to dismiss this case, under the fifty-fourth rule of the court, which rule is repeated amongst the preliminary matter in 8 Howard, and is as follows:—

"No. 54.

"Ordered, that where an appearance is not entered on the record for either the plaintiff or defendant on or before the second day of the term next succeeding that at which the case is docketed, it shall be dismissed at the costs of the plaintiff."

Whereupon this court, not being now here sufficiently advised of and concerning what order to render in the premises, took time to consider.

On the 4th of March, 1851, Mr. Chief Justice TANEY delivered the opinion of the court.

The fifty-fourth rule applies to cases docketed at the regular term; and not to an adjourned term. For it may happen that an adjourned term may be held immediately preceding the regular session.

This case was not docketed until after the close of the regular term of the court, and is, therefore, not within the rule.

Order.

On consideration of the motion made in this case by Mr. Stanton, on a prior day of the present term, to wit, on Friday the 28th ultimo, it is now here ordered by the court, that said motion be, and the same is hereby, overruled.

PETER HOGG AND CORNELIUS H. DELAMATER, PLAINTIFFS IN ERROR, *v.* JOHN B. EMERSON.

The decision of this court in the case of Hogg et al. *v.* Emerson, 6 Howard, 437, reviewed and affirmed.

The specification of Emerson's patent "for certain improvements in the steam-engine and in the mode of propelling therewith either vessels on the water or carriages on the land," constituted a part of the patent, and must be construed with it. Anterior to 1836, the law did not imperatively require that the specification be made a part of the patent, but the inventor had a right to advise the Commissioner of Patents to make the specification a part of the patent, and it was peculiarly proper that he should comply with the request.

This court again decides that the patent is sufficiently clear and certain, and does not cover more ground than one patent may cover. Only one is necessary for two kindred and auxilinry inventions.

The drawings which accompany the specification may be referred to for illustration. Within what time drawings ought to have been replaced, after the destruction of the Patent-Office by fire, so as to avoid the imputation of negligence or of a design to mislead the public, was a question which was properly left to the jury.

The principles stated, within whose operation a jury can properly act in assessing damages against the maker of a patented machine.

THIS case was brought up from the Circuit Court of the United States for the Southern District of New York.

It was reported in 6 Howard, 437, and at the conclusion of the report of that case is the following note: —

"NOTE. — After the delivery of this opinion, the counsel for the plaintiffs in error suggested that other questions were made below, which they desired to be considered, and therefore moved for another *certiorari* to bring them up. This was allowed, and judgment suspended till the next term."

Another *certiorari* was issued, which brought up the entire record. The case, as now to be reported, consists of three records, in parts. Instead of republishing those parts already reported, they will only be referred to; and if the reader is desirous to investigate the case thoroughly, he must read this report in conjunction with that in 6 Howard.

On the 8th of March, 1834, John B. Emerson obtained a patent for a new and useful improvement in the steam-engine, which is set forth, together with the schedule, in 6 Howard, 437 et seq.

At April term, 1844, he brought an action of trespass on the case against Hogg and Delamater for an infringement of his patent right. The declaration is inserted *in extenso* in 6 Howard. The defendants filed the general issue plea, and gave the following notices.

"Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.

"PETER HOGG & CORNELIUS DELAMATER *v.* JOHN B. EMERSON.

"SIR, — You will please to take notice that, on the trial of the above-entitled cause, without waiving the right to require the plaintiff to make out all facts essential to support and prove his declaration and cause, and without admitting any part thereof, the defendants will, under the plea of the general issue aforesaid, give in evidence, prove, and insist upon the following special matter, of which notice is hereby given, pursuant to the statute, in addition to such other defence as they are by law entitled to make.

"I. That the patent granted to John B. Emerson, bearing date the 8th day of March, 1834, under which the said plaintiff claims, is void for the following, among other reasons: —

"1. Because, although it is, in and by the schedule annexed to the said patent, recited that the said John B. Emerson had alleged that he had invented a new and useful improvement in the steam-engine, and in the mode of propelling therewith either vessels on the water or carriages on the land; and it is claimed that, in and by the said patent, the exclusive right and liberty of making, using, and vending to others to be used, the said improvement, was granted to the said John B. Emerson, his heirs, executors, administrators, or assigns, for the term of fourteen years from and after the date of the said patent; yet the said patentee did not (according to law) deliver, with his application for the said patent, or at any other time, to any of the officers who were to consider his application, a written description of his said improvement or invention, and of the manner of using the same, in such full, clear, and exact terms, as to distinguish the same from all other things before known, and to enable any person skilled in mechanics to make and use the said invention; and that the improvements claimed by the said John B. Emerson are not in the said patent, or in the schedule thereto annexed, described in

such full, clear, and exact terms as to distinguish the same from all other things before known, or to enable any person skilled in mechanics to make or use the said improvements; and that the said John B. Emerson did not deliver, with his said application for the said patent, or at any other time, to any of the officers who were to consider his application, a full explanation of his said improvements, and the several modes in which he had contemplated the application of the principle by which they could be distinguished from other inventions, and he did not accompany his application with drawings and written reference, as required by law.

"2. Because the said patent is granted for an improvement in the steam-engine; and in the schedule annexed to the said patent the said John B. Emerson has claimed as his invention different, and distinct improvements, to wit, in the steam-engine and in the paddle-wheel, either of which may be used singly and separately for the purpose indicated in said schedule. And although the said John B. Emerson, in the schedule annexed to the said patent, does not claim the invention of spiral paddle-wheels, but claims merely the invention of an improvement in spiral paddle-wheels already essayed, yet he has not, in the said schedule annexed to the said patent, described in what his said improvement in the said spiral paddle-wheels consists; so that any person skilled in mechanics can know wherein the paddle-wheels mentioned in the said schedule differ from spiral paddle-wheels before known and used; and because no distinction or discrimination is made between the parts and portions of the said propelling-wheel of which the said John B. Emerson may be the inventor or discoverer; the said defendants protesting at the same time that the said John B. Emerson has not been the inventor or discoverer of any part or portion of the alleged improvements.

"3. Because the thing patented as set forth in the said patent is different from the things claimed as the invention of the patentee in the schedule annexed to the patent. The thing patented is a new and useful improvement in the steam-engine; but in the schedules annexed to the said patent, the thing claimed by the said patentee as his inventions is not only the alleged improvement in the steam-engine, but also the spiral propelling-wheel, and the application of the revolving vertical shaft to the turning of a capstan on the deck of a vessel, while the specification indicates only an improvement in the spiral paddle-wheel, without describing the same in such full, clear, and exact terms as to distinguish the same from all other things before known, or to enable any person skilled in mechanics to make or use the said improvement.

"4. Because the drawings of his alleged invention, as deposited in the Patent-Office, do not agree with each other, nor with the specification to his letters patent annexed, and render it altogether doubtful and uncertain what his alleged invention truly and really was.

"II. And the said defendants will further give in evidence, and prove on the trial of the issue aforesaid, that the machine for propelling boats alleged to have been made by them, in violation of the right of the plaintiff in this case, was made, if made at all, under certain letters patent heretofore granted by the United States to one John Ericsson, to wit, on the 1st day of February, in the year 1838.

"III. And the said defendants will further give in evidence, and prove on the trial of the issue aforesaid, that there was at no time on file, or deposited in the Patent-Office, whilst they were engaged in making machines under the said John Ericsson's patent, any specifications or drawings deposited by the said John B. Emerson, from which any person skilled in mechanics could construct a machine similar to the machines they have constructed under the patent of the said John Ericsson.

"IV. And the said defendants will further give in evidence, and prove on the trial of the issue aforesaid, that the specification to the letters patent of the said John B. Emerson annexed contained no description of the inventions and improvements now alleged and pretended to be covered by his said letters patent, and claimed to be included therein.

"V. And the said defendants will further give in evidence, and prove on the trial of the issue aforesaid, that the said John B. Emerson was not the original inventor or discoverer of any part or parts of the propelling-wheel described in his said letters patent, or of any improvement in any part or parts of the said machine.

"VI. And the said defendants will further give in evidence, on the trial of the issue aforesaid, a printed description of a certain propelling-wheel, invented by Archibald Robinson, of London, which said description was published in one or more public works, and particularly in the seventh volume of the London Journal of Arts and Sciences, edited by W. Newton, and published in London in the year 1831, and extensively known to mechanics and engineers in the United States; tending to prove that the plaintiff was not the original and first inventor or discoverer of the thing patented, or of a substantial and material part thereof claimed as new, but that it had been described as aforesaid, in public works, before the supposed discovery thereof by the plaintiff.

"VII. And the said defendants will further give in evidence, on the trial of the issue aforesaid, the printed description of certain improvements in machinery for propelling steam-vessels, invented by Jacob Perkins, of London, as early as the year 1829, which said description was published in a public work, printed in London, in the year 1831, to wit, in the seventh volume of the London Journal of Arts and Sciences, edited by W. Newton, a well-known scientific journal, published in London in the year aforesaid. And the said defendants will further give in evidence a plate, number nine in the said volume, containing an engraved delineation of the said invention; all tending to prove that the plaintiff was not the original and true inventor or discoverer of the thing patented, or of a substantial and material part thereof claimed as new, but that it had been described as aforesaid, in a public work, before the supposed discovery thereof by the plaintiff.

"VIII. And the said defendants will further give in evidence, on the trial of the issue aforesaid, a printed description of a certain mode of propelling boats in the water by the application of sculling-wheels, or screw propelling-wheels, invented by Benjamin M. Smith, which said description was published in the year 1830, in the sixth volume of the new series of the Franklin Institute, a scientific journal published in the city of Philadelphia, in the State of Pennsylvania, tending to prove that the plaintiff was not the original and true inventor or discoverer of the thing patented, or of a substantial and material part thereof claimed as new, but that it had been described as aforesaid in a public work before the supposed discovery thereof by the plaintiff.

"IX. And the said defendants will further give in evidence, and prove on the trial of the issue aforesaid, that the said machine, alleged in the plaintiff's writ in this cause to have been made by the said defendants, does not in any of its parts resemble the machine described in the schedule annexed to the letters patent granted to the said plaintiff.

"X. And the said defendants will further give in evidence, and prove on the trial of the issue aforesaid, that the said John B. Emerson, if he was really the inventor of the improvements now alleged, pretended, and claimed by him, voluntarily abandoned the same to the public.

"XI. And the said defendants will further give in evidence, and prove on the trial of the issue aforesaid, that they have never made, used, or sold the machine patented by the said John B. Emerson, or any part thereof, nor any imitation of the said machine, nor of any part thereof.

"XII. And the said defendants will further give in evidence,

and prove on the trial of the issue aforesaid, that the description and specification filed by the said plaintiff do not contain the whole truth relative to this invention or discovery.

"Dated New York, October 26th, 1844.

"Yours, &c., P. A. HANFORD,
Attorney for Defendants.

"To PETER CLARK, ESQ., *Attorney for Plaintiff.*"

"Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit

"PETER HOGG & CORNELIUS DELAMATER *v.* JOHN B. EMERSON.

"SIR, — You will please to take notice that, on the trial of the above-entitled cause, the defendants, in addition to the various matters set forth in the notice heretofore given in this cause, under date of the 26th of October, 1844, will, under the plea of the general issue, prove and insist upon the following special matter, of which notice is hereby given pursuant to statute.

"The said defendants will give in evidence, on the trial of the issue aforesaid, the letters patent granted to John Ericsson by the English government in 1836, and the letters patent granted him by the government of the United States in the years 1838 and 1840.

"The said defendants will also give in evidence copies of letters patent granted by the United States government to Josiah Copley, for a spiral propeller, under date of May 22, 1830; and to John L. Sullivan, under date of March 24, 1817, for a submarine propeller; and to Edward P. Fitzpatrick, under date of November 23, 1835, for a screw for propelling boats; and to James Widdifield, under date of October 11, 1815, for propelling boats by screw wheel; and to John L. Smith, under date of September 18, 1835, for propelling boats by screw wheel; and to Henry W. Wheatley, under date of December 30, 1818, for propelling boats by screw power; and to Jesse Ong, on the 22d of May, 1837, for propelling paddle-wheels.

"The said defendants will also give in evidence the digest of patents issued by the United States, published under the superintendence of the Commissioner of Patents in 1840, and more particularly pages 219, 220, 221, 222, 223, 224, 225, of the same.

"The said defendants will also give in evidence a description of certain improvements in propelling vessels, communicated by Charles Cummerow of London, and published in Newton's London Journal, second series, eighth volume, page 44; which volume the said defendants will give in evidence.

"The said defendants will also give in evidence a description of certain improvements in the construction and adaptation of a revolving spiral paddle, for propelling boats and other vessels, patented by the British government to Bennet Woodcroft of Manchester, in the county palatine of Lancaster, printed and published in Newton's Journal, third series, first volume, page 349; which volume the said defendants will give in evidence.

"The said defendants will also give in evidence the seventh volume of the Repertory of Patent Inventions, for 1837, published in London, and the copy, printed at page 172 of the same, of certain letters patent granted to F. P. Smith for an improved propeller.

"The said defendants will also give in evidence certain letters patent, issued by the government of the United States to Francis P. Smith, for an improved propeller, bearing date the 12th day of November, 1841.

"The said defendants will also give in evidence, that the alleged invention of the said plaintiff, or so much thereof as the said plaintiff may allege or claim that the said defendants have infringed, was invented, known, and used before the same was patented or invented by the said plaintiff. And the said defendants will prove the said prior use and knowledge of the said alleged improvement or invention, and where the same had been used by Dr. Thomas P. Jones, who resides in the city of Washington, in the District of Columbia.

"The said defendants will also give in evidence the sixth volume of the Journal of the Franklin Institute, new series, page 149, where is contained an account of the spiral propeller above referred to, patented to Josiah Copley, and the fifth volume of the same, new series, page 136, where is contained a notice of the propeller patented to Benjamin P. Smith.

"The said defendants will also give in evidence certain letters patent granted to John S. Trott of Boston, by the government of the United States, under date of June 2d, 1818, for propelling wheels for boats by animal power.

"Dated New York, October 27th, 1845.

"Yours, &c., F. A. HANFORD,
Attorney for Defendants.

"To PETER CLARK, ESQ., *Attorney for Plaintiff.*"

In May 1847, the cause came on for trial. Both plaintiff and defendant examined many witnesses; the substance of the testimony on the part of the defendants is stated in the argumentative opening of their counsel in this court, which is copied in order to show their view of the evidence. After it was closed, the counsel for the defendants made the following prayers to the court to instruct the jury.

"1. That the claim of the plaintiff, as set forth in his specification annexed to his letters patent, embraces the entire spiral paddle-wheel. The claim is therefore too broad upon the face of it, and the letters patent are void upon this ground, and the defendants are entitled to a verdict.

"2. That if the court should depart from the language of the patentee, in which he has made his claim, for the purpose of giving to that claim a limitation which may not be too broad, it could not clearly, or with any reasonable certainty, or without resorting to conjecture, be determined by the court what the claim was; and the patent is therefore void for ambiguity, and the defendants are entitled to a verdict.

"3. That the patent is void upon its face for this, that, purporting to be a patent for an improvement, and specifying that the invention is of an improved spiral paddle-wheel, differing essentially from any which have been heretofore essayed, without pointing out in what the difference consists, or in any manner whatever indicating the improvement by distinguishing it from the previously essayed spiral wheels, it is wanting in an essential prerequisite to the validity of letters patent for an improvement.

"4. That the patent is void upon its face for this, that it embraces several distinct and separate inventions as improvements in several distinct and independent machines, susceptible of independent operation, not necessarily connected with each other in producing the result aimed at in the invention, and the subject-matter of separate and independent patents.

"5. That, inasmuch as it appears conclusively by the deposition of Arthur L. McIntyre, the officer in the Patent-Office of the United States who has the care and custody of the drawings therein filed, that on the 12th day of February, 1844, the plaintiff filed a drawing, sworn to by him as a correct delineation of his invention, which drawing had been on file since the 5th day of May, 1841, when it was there deposited by the plaintiff unattested; that said drawing became a part of the record of the plaintiff's patent, and that the said record was then complete; and the rights and privileges of the plaintiff, under the act of Congress of March 3d, 1837, were exhausted by the filing of said attested drawing, and therefore said drawing was the one which (if any) should have been introduced in evidence as the recorded delineation of the invention, and the second drawing subsequently filed and introduced in evidence should be disregarded by the jury.

"6. Though inasmuch as it appears conclusively by the sition of Arthur L. McIntyre, as before stated, that on 2th day of February, 1844, the plaintiff filed a drawing,

sworn to by himself as a correct delineation of his invention, which drawing had been on file since the 5th day of May, 1841, when it was there deposited by the plaintiff, unattested, that said drawing became a part of the record of plaintiff's patent, and that as against these defendants, who, by legal presumption, were notified of the nature and character of the invention of said first drawing, he is now estopped from asserting that the same is not a true delineation of his invention, either by the testimony of witnesses, or by the introduction of a second and different drawing.

"7. That the rule of law whicl. declares the drawings for patentee to be part of his patent, and that they may be referred to for the purpose of helping out the specification, should be limited to those cases in which the drawings are either annexed to or referred to in the specification; and that even in such case the drawings cannot be resorted to for the purpose of adding to, or in any manner enlarging, the claim as set forth in the specification.

"8. That, if the second drawing which has been exhibited in evidence is to be regarded as a part of the plaintiff's patent, and to be referred to to help out the specification, there must be a conformity between them. If they are substantially at variance, and incongruous, and inconsistent with each other, it is a fatal defect in the patent, which alone is sufficient to prevent the recovery of the plaintiff.

"9. That if, from the testimony, the jury believe that the placing of the paddles obliquely upon the rim of the wheel, sworn to by John S. Trott as having been done by him in 1818, was substantially the same in principle as placing them spirally upon said rim, the defendants are entitled to a verdict.

"10. That the plaintiff must satisfy the jury, (to sustain the only judicial construction of which the patent admits,) that he is the first and original inventor of the spiral form of the propelling float; and if from the evidence in relation to the patent and wheel of Benjamin M. Smith, in 1829, — of Ebenezer Beard, in and of the spiral float used by John Stevens, in 1805, — they believe that this spiral form was not new in the plaintiff, but was known and used before his patent, that upon this ground the defendants are entitled to a verdict.

"11. That if the jury believe, from the specification of the plaintiff and the testimony, that he designed to express his improvement to consist in the trough form given to the propelling plates by bending them along the centre, so that the sides of the plates shall be at right angles, or nearly so, to each other, and that this trough form, thus produced previous to giving the plate the spiral curve longitudinally, is to be considered as of

the essence of plaintiff's invention, then the defendants have not infringed upon his rights, and are entitled to a verdict.

"12. That if the jury believe, from the specification and the testimony, that neither a cylindrical band nor the twisted spokes were described by the plaintiff as constituting a part of the paddle-wheel by him patented, the same cannot be added as a component part of his invention by their insertion in a drawing filed ten years after the issuing of his letters patent.

"13. That from the silence in the specification, both as to the hoop or cylindrical band and twisted spoke, notwithstanding their delineation in the drawing, the jury must infer one of two things; either that the plaintiff did not invent, and therefore did not describe them, or that they were (as his witness Allaire in substance testified) not the subject-matter of invention at the time at all, being old and well-known parts of the machine described.

"14. That unless the jury believe from the testimony that the plaintiff, before the issuing of his letters patent, actually reduced his alleged invention to practice, the patent is void, and the defendants are entitled to a verdict.

"15. That if, from the testimony, the jury believe that Captain Ericsson actually reduced the propelling wheel to practice, such as were constructed by the defendants, before the same were reduced to practice by the plaintiff, the defendants are entitled to a verdict.

"16. That the exclusive rights of a patentee are to make as well as to use, and vend to others to be used, and that the rule of damages, as against the manufacturer who has invaded the exclusive right to make it, are the profits which he has derived, or which the plaintiff might have derived from such making, because it is the sum which by his invasion he has prevented the patentee from obtaining.

"17. That if from the evidence the jury are satisfied that no propelling-wheels were made by the defendants between the 27th of March, 1844, the date of the alleged completion of the record of the plaintiff's patent, under the act of March 3d, 1837, and the commencement of this suit in April following, upon this ground the defendants are entitled to a verdict.

"18. That the invention of the plaintiff, as described in his specification, as illustrated by his drawing, cannot be regarded as a combination of the several parts of the wheel; as a combination the invention is not brought out in the specification or drawings, and such a view of the case is entirely inadmissible."

But the court refused to instruct the jury according to the prayers of the defendants, and charged them as follows.

(That part of the charge which was brought up by the record in 6 Howard is there printed; but the *certiorari* having brought up the residue, it is now printed entire.)

"The court, in charging the jury, submitted to them, as a question of fact, whether the drawings made by Dr. Jones, in 1844, of the paddle-wheel of the plaintiff, were substantially in conformity with the drawing filed and model deposited in the Patent-Office in 1834; that if this fact was found in the affirmative, it was not seriously disputed but that the wheel of Ericsson was similar to one constructed from the specification and drawing of the plaintiff when taken together.

"The court further charged, that if the jury found the above question in the negative, then it would become necessary for them to inquire whether the specification, without the aid of the drawing, was sufficient to enable a mechanic of ordinary skill to construct the plaintiff's wheel; such a one as could be constructed with the aid of it.

"The court further charged, that the claim of the plaintiff was for an improvement upon the spiral paddle-wheel or propeller; that, by a new arrangement of the parts of the wheel, he had been enabled to effect a new and improved application and use of the same in the propulsion of vessels; that the ground upon which the claim is founded was this: it is the getting rid of nearly all the resisting surface of the wheels of Stevens, Smith, and others, by placing the spiral paddles or propelling surfaces on the ends of arms, instead of carrying the paddles themselves in a continued surface to the hub or shaft. It is claimed that a great portion of the old blade not only did not aid in the propulsion, but actually impaired its efficiency, and also that the improved wheel is made stronger.

"It was made a question, on the former trial, whether the plaintiff did not claim, or intend to claim, the entire wheel; but we understand it to be for an improvement upon the spiral paddle-wheel, claimed to be new and useful in the arrangement of its parts, and more effective by fixing the spiral paddles upon the extremity of the arms at a distance from the shaft.

"The court further, in charging the jury, submitted to them the question, whether the plaintiff was the first and original inventor of the improvement, referring them to the evidence upon this branch of the case.

"The court further instructed the jury, that the description of the invention was sufficient, and that the objection that the patent embraced several distinct discoveries was untenable.

"That the filing of imperfect drawings of his wheel in 1841 did not preclude the plaintiff from filing a corrected one in 1844, and that the drawing could be referred to in aid of the

specification, though not annexed to the patent, or referred to in the specification; if it was filed with the application in the Patent-Office at the time of the taking out of the patent, it is then a part of the record.

"That if the drawing and specification were so contradictory that a mechanic of ordinary skill could not construct the wheel, the patent was void. But if the latter was ambiguous, obscure, or doubtful, the drawing might be referred to to remove the difficulty.

"That the omission or neglect of the patentee to bring his improvement into public use did not forfeit his right to the invention, and that the fact of Ericsson's propeller having been brought into public use first did not give his patent priority, if the plaintiff was the first and original inventor.

"We do not understand that the original inventor and patentee, in order to enable him to maintain an action for an infringement, must prove that he put his patent in use by actually building a boat, and running her with a propeller; it is sufficient, if he shows by his experiments, model, and descriptions, that his improvement is useful.

"On the question of damages, the court instructed the jury, that the settled rule was to give the actual damages that the plaintiff had sustained. And it was apprehended, as applied to the case before them, that that would be the sum the patentee was entitled to for the right to make his propeller to be used in the several vessels built by the defendants, and in which Ericsson's propeller had been placed by them.

"That the damages were not necessarily confined to the making of the wheels between March, 1844, when the drawings were restored to the Patent-Office, and the bringing of the suit. Such a limitation assumes that there can be no infringement of the patent after the destruction of the records in 1836, until they are restored to the Patent-Office, and that during the intermediate time the rights of the patentee might be violated with impunity. We do not assent to this view.

"In the first place, the act of Congress providing for the restoration was not passed until the 3d of March, 1837; and in the second place, in addition to this, a considerable period of time must necessarily elapse before the act would be generally known; and then a still further period before copies of the drawings and models could be procured. Patentees were not responsible for the fire, nor did it work a forfeiture of their rights.

"The ground for the restriction claimed is, that the community have no means of ascertaining, but by a resort to the records of the Patent-Office, whether the construction of a par-

ticular machine or instrument would be a violation of the rights of others, and the infringement might be innocently committed.

"But, if the embarrassment happened without the fault of the patentee, he is not responsible for it; nor is the reason applicable to the case of a patent that has been published, and the invention known to the public. The specification in this case had been published. It is true, if it did not sufficiently describe the improvement without the aid of the drawing, this fact would not help the plaintiff.

"If there were unreasonable delay and neglect in restoring the records, and in the mean time a defendant had innocently made the patented article, a fair ground would be laid for a mitigation of the rule of damages, if not for withholding them altogether; and the court left the question of fact, as to reasonable diligence of the patentee or not, in this respect, and also all questions of fact involved in the points of the case for the defendants, to the jury."

The counsel for the defendants, having taken an exception to all that part of the charge which was inconsistent with their prayers, brought the case up to this court.

It was argued by *Mr. John O. Sargent*, from a brief filed by himself and *Mr. Johnson*, for the plaintiffs in error, and by *Mr. Gillet*, for the defendant in error.

The counsel for the plaintiffs in error stated the case as follows.

On the 8th of March, 1834, John B. Emerson obtained letters patent of the United States for certain improvements in the steam-engine. In December, 1836, the copy of the letters in the Patent-Office, with the drawing and the model, was destroyed by fire. In 1837, Congress passed an act, calling upon inventors, whose models and drawings and letters had been destroyed, to replace them. (5 Stat. at Large, 191.) In 1841, Emerson recorded his letters anew, and filed an unattested drawing. In 1844, February 12, he completed his record by swearing to said drawing, and filing it in the Patent-Office. In March, 1844, he visited Washington, and, on consultation with Dr. Jones, prepared a new drawing, and swore to it, and filed it. In the month of May, he commenced a suit against Hogg and Delamater for making the Ericsson propeller.

In the year 1835, the instrument known as the Ericsson propeller was in operation in London. In 1838, it was patented in the United States. From 1839 to 1844, it was made by manufacturers in New York and elsewhere, without hinderance or molestation, till the suit was commenced against Hogg and Delamater. This instrument is a cylindrical band, supporting

a series of spiral planes, and sustained on the shaft by two or more twisted spokes. The spokes and the band constitute its peculiar and patentable features.

John B. Emerson's specification contains no allusion to a cylindrical band or a twisted spoke. His drawing, filed in March, 1844, adopts and adds these features. The only evidence tending to show that they were contemplated by him at any time is a model said to have been made in 1837, two years after Ericsson's propeller was in operation in London. This model contains three hoops, and nine or more spiral arms. From this model of 1837, and information of the patentee, Dr. Jones made the drawing of 1844.

Hogg and Delamater were iron-founders in the city of New York. They made no propellers to use, and used none; they merely manufactured them to order. They had no interest whatever in the patent right of Captain Ericsson. No evidence appears in the case, tending to show any such interest.

It is not pretended that J. B. Emerson ever, at any time, reduced his wheel to practice, until the year 1843, when he made an experiment with it in the harbor of New Orleans. All that we know of it, therefore, prior to the year 1837, is derived from the drawing made from the model of 1837, or the statement of the patentee himself, and the formal oath that this drawing was a correct delineation of his invention.

The attempt, therefore, to incorporate the spiral spoke, and the cylindrical band or hoop, into Mr. J. B. Emerson's patent, rests exclusively upon his own allegation, which is unsupported entirely by the specification. Emerson's own witnesses admit that there is no mention of these features in the specification, and Dr. Jones, Keller, Birkbeck, Dunham, Belknap, Bartol, Cunningham, Mapes, Cox, and Kemp swear distinctly that the specification, in this respect, contradicts the drawing. It is not denied that the absence of these would destroy every point of resemblance between Emerson's wheel and Ericsson's propeller.

It was distinctly proved by John S. Trott and Nathan Rice, that the entire wheel of Ericsson, except the spiral twist of the propelling blade and the spiral twist of the arm, was in use in 1818, and then patented by Trott. Evidence was also offered tending to show that Trott's wheel, with the oblique float, operated on the same principle with Ericsson's wheel with the spiral float.

It was distinctly proved, that spiral wheels, with arms, employed at the stern, and submerged, were successfully in use long before J. B. Emerson obtained a patent.

The trough form which is so distinctly dwelt upon in Emer-

son's specifications, and which in fact constitutes the only feature described and relied upon, does not exist in the Ericsson propeller. The latter instrument employs only spiral planes, which had been in use half a century.

In 1847, a verdict was rendered in the cause against the defendants below, and judgment taken thereon, on which a writ of error was allowed under the seventeenth section of the patent act, restricted to certain questions made at the trial, and upon certain conditions; among which were those of submitting the case on written arguments, within a limited time, and of paying the amount of the judgment into court. The cause was argued according to those conditions, and the court gave an opinion in the case, in which they decided substantially, that the plaintiffs here were entitled to stand before this court like all other suitors, and that the writ, if granted, must be on the whole case.

Judgment was therefore suspended, on plaintiffs' suggestion of a diminution of the record, and a *certiorari* issued, by which the case is now brought before the court.

Points.

I. The defendant in error has no patent for an improved spiral paddle-wheel.

American Authorities: — Phillips on Patents, 224, and cases; Curtis, 127, 208; Sullivan *v.* Redfield, Paine, C. C. 442; Shaw *v.* Cooper, 7 Pet. 292, 315; Evans *v.* Chambers, 2 Wash. C. C. 125; Barrett *v.* Hall, 1 Mason, 476; Whittemore *v.* Cutter, 1 Gallis. 437; Evans *v.* Eaton, Peters, C. C. 340, 341; Kneiss *v.* Schuylkill Bank, 4 Wash. C. C. 9; Cutting et al. *v.* Myers, 4 Wash. C. C. 220; 1 Stat. at Large, 319, §§ 1, 3.

English Authorities: — Godson on Patents, 108, 113, and cases; Neilson *v.* Harford, Webst. 312 and arg.; Rex *v.* Wheeler, 2 Barn. & Ald. 350; S. C., 3 Merivale, 629; Glegg's Patent, Webst. 117; Russell *v.* Cowley, Webst. 470; Household *v.* Neilson, Webst. 679; Webster on Patents, p. 65; Hindmarch, 41, 42, 509, 510, 511; Godson, 170.

II. If the defendant's patent is for the combination of instruments described in the specification, there is no pretence that the combination has been infringed; if for several improved machines, it cannot be supported in law. Evans *v.* Eaton, 3 Wheat. 454; Barrett *v.* Hall, 1 Mason, 447; Moody *v.* Fiske, 2 Mason, 112; Wyeth *v.* Stone, 1 Story, 290.

III. The claim of the specification is too broad, and the patent therefore void; and the patent does not distinguish the improvement from other inventions.

English Authorities: — McFarlane *v.* Price, 1 Starkie, 199;

In re Nickels, Hindmarch on Patents, 186; Hill *v.* Thompson, 3 Merivale, 622; S. C., 8 Taunton, 325; Williams *v.* Brodie, Davis's Pat. Cases, 96, 97; Manton *v.* Manton, Davis's Pat. Cases, 349; Minter *v.* Wells, 1 Webst. 130.

American Authorities: — Dixon *v.* Moyer, 4 Wash. C. C. 69; Evans *v.* Hettick, 3 Wash. C. C. 425; Lowell *v.* Lewis, 1 Mason, C. C. 189; Ames *v.* Howard, 1 Sumner, 482; Evans *v.* Eaton, 3 Wheat. 454; Woodcock *v.* Parker, 1 Gallis. 438; Whittemore *v.* Cutter, 1 Gallis. 478; Odiorne *v.* Winkley, 2 Gallis. 51; Barrett *v.* Hall, 1 Mason, 447; Sullivan *v.* Redfield, Paine, C. C. 441; Evans *v.* Eaton, 7 Wheat. 408; Isaacs *v.* Cooper, 4 Wash. C. C. 261; Cross *v.* Huntly, 13 Wend. 385; Head *v.* Stevens, 19 Wend. 411; Kneiss *v.* Schuylkill Bank, 4 Wash. C. C. 9; Morris *v.* Jenkins et al., 3 McLean, 250; Peterson *v.* Woodler, Ibid. 248.

IV. The drawing, filed March 27, 1844, was not legal evidence of the defendant's patented invention, because there was a drawing filed by the patentee on the 12th of February previous, which was, by the second section of the act of 1837, with his letters patent, the only legal evidence of his invention, as patented, that could be offered in any judicial court of the United States.

V. The patentee, after an alleged correction of his letters patent by filing the second drawing, could not in law avail himself of that correction to cover causes of action that had previously accrued; and in the absence of proof of any subsequent infringements the plaintiffs here were entitled to a verdict below. In re Nickels, Turner & Phillips, 44; S. C., 1 Webst. 659; Hindmarch on Patents (Eng. ed.), 216 et seq.; Wyeth *v.* Stone, 1 Story, 290; Woodworth *v.* Hall, 1 Wood. & Min. 248, 389.

VI. The defendants below, having sought to establish by the testimony of Jones, Keller, Birkbeck, Dunham, Belknap, Bartol, Stillman, Cunningham, Mapes, Cox, and Kemp, the nonconformity of Emerson's specification of 1834 to the drawing filed in 1844, and having disputed, at every step, that Ericsson's propeller, or any thing like it, could be made by taking the two together, were entitled to the instructions sought by their eighth prayer; and the various instructions of the court on the subject of the drawing amounted distinctly to a denial of that prayer.

VII. The original letters patent were produced in evidence. There was no drawing annexed, referred to in them, or accompanying them. No case has gone so far as to say that any other drawing shall be permitted to enlarge or add to the specification. Curtis on Patents, 123, 125, 173, 174, and cases there cited; Brooks *v.* Bicknell, 3 McLean, 250, 261.

VIII. The wheel patented by John S. Trott, in 1818, having been proved to be identical with that made by Ericsson, with the single exception of the spiral curvature to the arms and the paddles, the ninth prayer of the defendants below should have been allowed.

IX. The court erred in rejecting a portion of C. M. Keller's deposition.

X. The court erred in admitting testimony as to the patent fee paid to Captain Ericsson, as a measure of damages against the manufacturers.

XI. The court erred in refusing the sixteenth prayer, on the subject of damages; and in instructing the jury, as matter of law, that the actual damages sustained by Mr. Emerson, by the manufacture of the Ericsson propeller, was the sum the patentee was entitled to for the right to make his propeller to be used in the several vessels built by the defendants, and in which the Ericsson propeller had been placed by them. The defendants were the manufacturers, built no vessels, used no propellers, sold no propellers, but were merely employed to make. The actual damage, by the invasion of the right to make, was the maker's profit, and not the patentee's fee. Curtis on Patents, 292, 293, 294, 295, and cases there cited; Bryce *v.* Dorr, 3 McLean, 582; Whittemore *v.* Cutter, 1 Gallis. 429; Earle *v.* Sawyer, 4 Mason, 1, 12.

XII. Whether or not there was reason for withholding damages altogether was a question for the court, and should not have been left to the jury, where there was no dispute about the facts, as in the case presented by the record. Bend *v.* Hoyt, 13 Peters, 263; Ellis *v.* Paige, 1 Pick. 43; S. C., 2 Ib. 71; Livingston & Gilchrist *v.* Maryland Ins. Co., 7 Cranch, 506; Gilbert *v.* Moody, 17 Wend. 354; Oliver *v.* Maryland Ins. Co., 7 Cranch, 495; Reynolds *v.* Ocean Ins. Co., 22 Pick. 191.

XIV. Whoever first perfects a machine is entitled to the patent, and is the real inventor, although others may previously have had the idea, and made some experiments towards putting it in practice. He is the inventor, and is entitled to the patent, who first brings a machine to perfection, and renders it capable of useful operation. Washburn *v.* Gould, 3 Story, 133.

Of *Mr. Gillet's* argument for the defendant in error, the reporter has no notes.

Mr. Justice WOODBURY delivered the opinion of the court.

This is the same case which has been before us on a former occasion, as reported in 6 Howard, 437.

The decision there announced on the points presented by

that record was accompanied by a ruling that, in writs of error in patent cases, all the questions of law which arose at the trial might be brought up, and not, as there, only such as the court below should deem reasonable. Thereupon the counsel for the plaintiffs in error moved for a *certiorari* to transfer here such other questions as had not been before brought up and decided.

This *certiorari* and a subsequent one having been allowed, the same counsel proceeded to argue the questions appearing on the whole record, as well those on which an opinion had already been pronounced, as the new questions arising on the additional parts of the record.

This was objected to by the defendants in error, but permitted by the court, on the ground, that a division among them existed before, and that two, if not three, members of the court were now present, who were not when the former opinion was agreed to. On this state of things, having heard the whole case fully reargued, the first inquiry is, if any of the points before settled appear to have been ruled erroneously, either on the record as it then stood, or on it including the new matter since brought up.

It is very manifest that this matter does not relate to any of the former points, and consequently does not impair, or in any way affect them, or our decision before given upon them.

In the next place, has the new argument, or the further consideration of the case, presented any thing which justifies a change of views on what was then settled. We think not.

Without repeating the whole reasoning and precedents stated in 6 Howard, in support of the former views of the court, we shall only submit a few further explanations concerning some of them.

On the leading question, whether the invention is sufficiently described in the letters patent, it may be sufficient to add, that this depends on what must be considered as a part of those letters.

The letters in this case were taken out in 1834, under the act of 1793, and the law did not then require the patentee or the commissioner to make the specification a part of the letters patent, as it does by the act of 1836. But the inventor still had a right, if he pleased, for greater fulness and clearness, not only to file a specification as such, and as the law directed, but to advise the Patent-Office also to incorporate it into the letters as a part of them by express terms of reference. This it would be peculiarly proper for the officers of the government to do, as the language of the specification is the language of the inventor, and describes the invention in his own way, and, it is to be

presumed, in the best way; whereas the language of the letters is that of the Commissioner of Patents or the President, who signs them, and, if standing alone, might by mistake or accident not fully describe the invention. Here, then, in order to avoid any such untoward result, they did expressly incorporate the whole specification into the patent as "a part" of it, besides referring to it for "a description" of the improvement.

This the officers had a right to do, as grantors in deeds have a right to refer to other deeds or papers, and annex or incorporate them as a part of the instrument of conveyance. See cases cited in 6 Howard.

A similar course is often pursued in policies of insurance by the makers of them, and in other contracts, as well as in declarations on accounts annexed. That such a course, too, is prudent, and to be encouraged in the case of patents, is shown by Congress in the act of 1836, imperatively requiring it to be done thereafter.

The specification being, therefore, in this case, voluntarily annexed, and made, in express terms, a part of the patent, though before the law required it to be done, it still became a portion of the patent by general principles, as clearly as it does since by the words of the law. It follows, also, that, being thus adopted and recognized as "a part" of the patent itself, if the improvement is there described with due fulness and certainty, it is so described in the patent itself.

But it is manifest that it is thus described there. In the very first lines it is set out, not only as "an improvement in the steam-engine," but "in the mode of propelling therewith either vessels on the water or carriages on the land." These together constitute a full and satisfactory description of the whole. It is an "improvement in the steam-engine," not in generating steam, but in applying it; and, after describing minutely the application of it for propelling carriages on land, it proceeds to point out, "when used for steamboats," how it is to be connected with "an improved spiral paddle-wheel."

After all this, no one, it is believed, could justly contend that the patent itself was defective, or likely to mislead in describing the improvement which the patentee claims to have invented.

Referring to the former opinion in this case for other reasons and decisions in support of this view, we proceed to the next objection. It is, that the improvement thus described is for more than one invention, and that one set of letters patent for more than one invention is not tolerated by law.

But grant that such is the result when two or more inventions are entirely separate and independent, — though this is

doubtful on principle,—yet it is well settled in the cases formerly cited, that a patent for more than one invention is not void, if they are connected in their design and operation. This last is clearly the case here. They all here relate to the propelling of carriages and vessels by steam, and only differ, as they must on water, from what they are on land; a paddle-wheel being necessary on the former, and not on the latter, and one being used on the former which is likewise claimed to be an improved one. All are a part of one combination when used on the water, and differing only as the parts must when used to propel in a different element.

In Wyeth et al. v. Stone et al., 1 Story, 288, in order to render different letters patent necessary, it is said, the inventions must be "wholly independent of each other, and distinct inventions for unconnected objects"; as one to spin cotton and "another to make paper."

Again, if one set of letters patent is permissible for one combination consisting of many parts, as is the daily practice, surely one will amply suffice for two or three portions of that combination.

The next point before decided was, that the description was sufficiently clear and certain. Under the instructions of the court, the jury found that it was clear enough to be understood by ordinary mechanics, and that machines and wheels could readily be made from it, considering the specification as a whole, and adverting to the drawings on file. This is all which the law requires in respect to clearness, and it does not appear necessary to add any thing to what is cited and stated in the former opinion in support of the instructions given below on this point.

The court did right, too, in holding to the propriety of looking to the whole specification, and also to the drawings, for explanation of any thing obscure. The drawings, then, being proper to be referred to in illustration of the specification, they could be restored when burnt, and if appearing in some respects erroneous, they could be corrected. That this last was done, and done well, was distinctly shown by Doctor Jones, a skilful draughtsman and expert. It would be unreasonable to prevent or refuse the correction of such errors, so as not to mislead nor cause contradictions; because, after all, it is the specification which governs, and the drawings merely illustrate. It is true that it would not be proper to leave the drawings so long, not restored nor corrected, as to evince neglect or a design to mislead the public; and the jury were allowed to decide what was a reasonable time for this purpose, under the circumstances of the case, and the duties im-

posed by law on the patentee. This being a point in part of law and in part of fact, it was properly submitted to the jury, and their finding must stand, unless it is shown, as has not been done, that illegal instructions were given to them concerning it, or that proper legal directions were omitted. See analogous cases, Chitty on Bills, 336, 379; 9 East, 347; 1 Camp. 246; Johnson *v.* Sutton, 1 D. & E. 514; 2 Barn. & Adol. 857, 858.

In respect to another objection, of the claim being too broad that was fully answered in the former opinion, and so was the objection, that damages could not be recovered after the fire, and before the restoration of the specification and drawings.

Certain new points are also presented on the new matter brought here by the *certiorari*. Among them, no one seems specially relied on, which is not involved in those already considered, except the instructions on the rule for settling the whole damages. It is true, that the verdict appears large in amount. But if too large, and the jury were properly instructed on the subject, the fault is theirs rather than the court's, and cannot be corrected here.

It is not, however, clear that it is too large, as it does not appear to have exceeded, and, indeed, it rather falls short of, the price paid for a license to make an improvement like this to be used in so many vessels. It is the making and selling to be used, and not the selling or buying or making alone, for which full damages are usually given. (10 Wheaton, 350; Curtis on Pat. 256, 3 note; 3 McLean, 427.) The court, therefore, being called on to lay down some general rule, very properly informed the jury that such price might be a suitable guide, and it is the customary one followed for making and selling patent stoves, lasts, spokes, &c., and seems once to have been treated by law as the chief guide in all patent cases; as the act of 1791, § 5, (1 Stat. at Large, 322,) gave three times its amount when one either made for sale or used a patented machine.

But that law being repealed, and the damages now left open for each case, the judge correctly added, that a fair ground existed for a mitigation below that amount, if the maker of the machine appeared in truth to be ignorant of the existence of the patent right, and did not intend any infringement. That would not, however, furnish a reason, as was insisted by the plaintiffs in error, for allowing no damages when making the machine *to be used*, and not, as in some cases, merely for a model, or for fancy, or philosophical illustration. (Whittemore *v.* Cutter, 1 Gallis. 429; Jones *v.* Pearce, Webster's P. C. 125; 3 McLean, 583.) The intent not to injure, also, never ex-

onerates, as is contended, in these cases, from all damages for the actual injury or encroachment, though it may mitigate them. (Bryce *v.* Dorr, 3 McLean, 583.) The further general suggestion by the judge, to give only the actual damages, was well calculated to prevent any thing vindictive or in excess, and justified the jury to go still lower than they did, if appearing just to them, and as has sometimes been done in this class of cases. (See Lowell *v.* Lewis, 1 Mason, C. C. 182; 1 Gall. C. C. 420.)

That, however, was a matter of discretion for the jury, under all the circumstances, and not a question of law for the court.

Nor will the consequence of damages so large as the present seem harsh, if thereby any further recovery should be prevented for using or selling as well as making the machine, but which point is not decided by us now, because not raised on the record. It may be added, however, in this connection, that the defendants are certainly relieved now from one consequence by way of damages or penalty which once existed, and which was to forfeit the materials of the machine to the patentee. (See section 4th in act of April 10th, 1790, 1 Stat. at Large, 111.) It must be a very extreme case, too, where a judgment below should be reversed on account of damages like these in actions *ex delicto*, and when the instructions suggested to the jury the true general rule and the leading ground for mitigation, as well as against excess, and when, if appearing to be clearly excessive under all circumstances, a new trial could have been moved and had on that account in the Circuit Court.

Judgment below affirmed.

Mr. Chief Justice TANEY, Mr. Justice CATRON, Mr. Justice DANIEL, and Mr. Justice GRIER dissented.

Mr. Justice CATRON.

To the opinion just delivered I dissent. I think the letters patent are for a single improvement on the steam-engine, and that the schedule has added two distinct inventions in addition; the one on the paddle to a wheel propelling machinery or a vessel of any kind in the water; and the second in applying the power of the shaft to turning a capstan by means of a cogwheel. These two claims are entirely independent of the improvement claimed in the letters patent actually granted; this is for inventing a piston and shaft which turn a wheel without employing a crank. And as this controversy depends on a supposed infringement of the improved paddle (which, in my judgment, is not covered by the letters), I therefore think that the suit cannot be maintained on the face of the letters.

Secondly, if these three distinct improvements had been claimed and granted in the letters, and described in the schedule, then the patent would be void, as I think, because no more than one invention, distinct and disconnected from others, can be granted in the same letters. Such is the construction that has been given to the legislation of Congress at the Patent-Office, and is supposed by me to be the correct one. If three independent inventions can be patented and monopolized together, so any number may be; by this means, the grant may cover many fictitious claims, with some valid ones, which latter will stand protected; so that little or no risk will be run by obtaining a grant for that which is not new; and by this mode of proceeding at the Patent-Office, fictitious claims may cover and assume to monopolize the ordinary implements now in use on the farm and in the workshop, and, yet more than is now the case, harass the public with fictitious and ill-founded claims to make and sell exclusively things in daily and extensive use. Although the claim may be fictitious, still this does not protect the public from harassment, as usually men using cheap implements cannot afford to litigate in the United States courts. It would be far better to allow the claim, unjust as it is, and pay the patentee his fraudulent demand, than incur the expense of a suit, which the patentee or his assignee may well afford to prosecute.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be; and the same is hereby, affirmed, with costs, and damages at the rate of six per centum per annum.

THE UNITED STATES, APPELLANTS, *v.* THE MAYOR, ALDERMEN, AND INHABITANTS OF THE CITIES OF PHILADELPHIA AND NEW ORLEANS.

The decision of this court in the United States *v.* Reynes (9 Howard, 127), again affirmed, to wit, that under the acts of Congress of May 26, 1824 (4 Stat. at Large, 52), and June 17, 1844 (5 Stat. at Large, 676), the courts of the United States have no power to decide upon complete or perfect titles to land.

The contract made between the Baron de Bastrop and the Spanish government did not vest a perfect title in Bastrop, and therefore this court can exercise jurisdiction over the claim.

The grant of twelve leagues square, given to Bastrop by the Spanish governor, only pointed out the place where the families were to settle which Bastrop was to bring in. The land was destined and appropriated to this purpose. There were to be five hundred families, who were to grow wheat, and Bastrop's interest was intended to be in the monopoly of manufacturing flour and exporting it to Havana and other places under the jurisdiction of the Spanish crown. With this view, he obtained separate grants for the bayous or mill-seats, and was bound to erect at least one mill within two years from the date of the grant.

The families which were introduced took their titles from the Spanish government, and not from Bastrop.

This case stands upon the same ground as the case of the United States v. King et al., 7 Howard, 833.

THIS was an appeal from the District Court of the United States for the District of Louisiana.

It was a petition filed by the corporate authorities of the cities of Philadelphia and New Orleans, claiming a large body of land under a grant alleged to have been made by the Baron de Carondelet, the Spanish governor of Louisiana, in 1796 and 1797, to the Baron de Bastrop.

All the title-papers are set forth in the opinion of the court, and it is unnecessary to repeat them. The derivation of title to the petitioners in this case is explained in their petition, which, being short, may be inserted.

"To the Honorable T. H. McCaleb, Judge of the District Court of the United States for the District of Louisiana.

"The petition of the Mayor, Aldermen, and Citizens of Philadelphia, and of the Mayor, Aldermen, and Inhabitants of the City of New Orleans, respectfully represents:

"That in the year 1795 or 1796, in the now State of Louisiana, of which the Baron de Carondelet was governor-general and vice-patron, a grant was made to the Baron de Bastrop, by the proper authorities, of a certain tract of land, twelve leagues square, lying on the Ouachita and Bayou Siard, to be located and surveyed, which was done in due and legal form, as by the annexed plot of survey, marked A, will more fully appear, which was afterwards approved and confirmed; your petitioners, for fuller information, refer to the documents published by authority of Congress, in Vol. II. State Papers, title Public Lands, page 772, No. 40; as also to the volume of land laws, published by Matthew St. Clair Clarke, page 951, &c., &c.

"Your petitioners further show, that on or about the 25th day of January, 1804, the said Baron de Bastrop conveyed to a certain Abraham Morehouse two thirds of the said tract, which was afterwards, by a compromise between the said Bastrop, Morehouse, and a certain Charles Lynch, modified so that Morehouse became entitled to four tenths, and Lynch to

six tenths of said grant; which said six tenths were afterwards conveyed to Edward Livingston, on the 18th day of September, 1807, as by documents marked B, C, D, E, and F, respectively, will appear.

"And they also show, that on or about the 5th day of March, 1810, at a sale made by order of T. C. Lewis, parish judge of the parish of Ouachita, 50,000 acres of the part assigned, and belonging to Abraham Morehouse, were seized and sold for taxes, when a certain Andrew Latting became the purchaser, and afterwards transferred to Andrew Morehouse and George Y. Morehouse, sons and lawful heirs of the said Abraham, and to Sophia L. Morehouse, Charles F. Morehouse, Ann M. Morehouse, and Eliza C. Morehouse, children also of the said Abraham, each the amount of 8,000 acres out of the 50,000 sold for taxes. That in 1813, the said Morehouse died, and thereby the remainder of the said property passed to his wife, Abigail Young, and her two sons, Andrew and George, and that on or about the 13th of January, 1824, Stephen Girard purchased the shares of said Sophia L., Charles F., Ann M., and Eliza C., and in May, 1825, he purchased of George the 8,000 so to him conveyed; that the 2,000 remaining were, by the said Latting, sold to Nathan Morse, in his own right and as attorney for R. R. Goelet, who conveyed the same to a certain Thomas Lovell, who sold them to Stephen Girard, as will more fully appear by the documents herewith filed, and marked G, H, I, J, K, KK, L, M, N, O, P, Q, R.

"That in the autumn of the year 1815, Andrew, the elder son, died, unmarried and without issue, whereby his estate passed to his mother, Abigail, and his surviving brother, George.

"That the said George, as well in his own right as in virtue of a power of attorney, duly executed by his mother, Abigail, constituted and appointed a certain William Griffith, of Burlington, in the State of New Jersey, their agent and trustee, for the purpose of selling and disposing of their interest in the said lands, which he accordingly did, on or about the 29th of January, 1822, to the said Stephen Girard, James Lyle, and Robert E. Griffith; as also of 10,000 acres of the same parcel, held by the said Wm. Griffith and Richard S. Coxe, of Georgetown, District of Columbia, about the 23d of January, 1824; that afterwards, viz. at the October term, 1827, of the Seventh Judicial District Court, in the parish of Ouachita, a partition was decreed between the said Girard, Lyle, and Griffith, whereby the portion of Girard was separated and set apart, as by said decree and the documents marked Q, R, S, T, U, V, W, and X, herewith filed, will more fully appear. And your

petitioners further show, that the portion assigned, as above stated, to Edward Livingston, an amount of 12,500 acres, was, by the said Girard, purchased, as per act herewith filed, and marked AA, about the 6th of November, 1819, from a certain John Carrier, of Baltimore, who purchased it from Samuel McKean of said city, being part of a larger parcel conveyed by the said Edward Livingston to Stephen Wante, by act marked CC.

"And they further show, that on or about the 22d of November, 1824, the said Stephen Girard purchased from John Hughes, of the parish of Ouachita, 4,300 acres of the same land, which said Hughes had purchased at sheriff's sale, being a part of that assigned to Andrew Morehouse, as appears by the document marked DD, herewith filed.

"And they further show, that on or about the 9th day of February, 1824, the said Stephen Girard purchased at sheriff's sale, in the case of Brooks, Syndic, *v.* G. Hamilton, 23,694 acres, which the said Hamilton purchased from Andrew Y. Morehouse, as by document EE, herewith filed, more fully appears.

"That on or about the 11th day of February, 1825, the said Stephen Girard purchased from Cesar McGlaughlin 4,000 acres of the same parcel, which the said McGlaughlin had purchased at the sheriff's sale in the said suit of Brooks, Syndic, *v.* Hamilton, which land the said Hamilton had acquired from the said Andrew Morehouse, in proof whereof he files the document FF.

"That on or about the 29th of September, 1807, the said Edward Livingston transferred to John Adair a portion of said lands, amounting to 75,000 acres.

"That on or about the 17th of October, 1807, the said John Adair conveyed to T. B. Franklin, of Ouachita, 2,340 acres of said land; and by act bearing date 11th February, 1828, the said T. B. Franklin conveyed the same to Stephen Girard, as per acts marked GG, HH, II, herewith filed, will more fully appear.

"That by act bearing date 23d February, 1808, the said Adair sold to Curry 10,000 acres of this part, which Curry conveyed to the said Girard on or about the 9th day of March, 1829; and, lastly, that on or about the 10th day of July, 1827, the said John Adair conveyed his remaining interest, amounting to 36,549 arpents, to the said Stephen Girard, whereby the latter became possessed of all the portion conveyed by the said Edward Livingston to the said John Adair; all which will more fully appear by documents LL, MM, and NN.

"Your petitioners further show that the said Stephen Girard, having first made his will, departed this life on or about the day of

"That by his said will, which has been duly proved, and a copy of which is herewith filed, and marked OO, he bequeathed to your petitioners the whole of his above-described property; from all which acts and deeds it results that your petitioners are the true and lawful owners of the said above-described portions of the Bastrop grant; they allege that there is no other person or persons claiming the same, or any part thereof, by a different title from that of your petitioners; nor are there any person or persons holding possession of any part thereof otherwise than by the lease or permission of your petitioners. But that the United States deny their title thereto, and claim the whole of the lands contained within the said Bastrop grant as part of the public domain.

"That the said title of the Baron de Bastrop has been partially submitted to the board of land commissioners, and by them reported on unfavorably.

"Wherefore your petitioners pray that the validity of their title may be inquired into and decided upon; to which purpose the United States may be cited by their representative, the district attorney, and that they may be confirmed in their said title, with all other and further relief.

"GEO. STRAWBRIDGE,
P. SOULÉ,
Of counsel for the cities of Philadelphia and N. Orleans."

There were ninety-six pages of exhibits filed with the petition. It is not necessary to give the substance either of them or of the testimony which was afterwards collected by the petitioners and the United States, because the question was decided entirely upon the construction of the grant.

In the progress of the case an order was made, on the motion of the claimants, for a jury to try certain disputed facts, the court reserving to itself "the decision upon the question of the validity or sufficiency of said grant under the colonial laws and regulations of Spain, in force in Louisiana at the date of the grant."

On the 8th of December, 1847, the following proceedings took place.

"The trial of this cause was to-day resumed. The argument for the plaintiffs was opened by H. Strawbridge, Esq., and closed by P. Soulé, Esq.; for the defendants, by Thomas J. Durant, United States District Attorney. The argument being closed, the court charged the jury; Silvain Peyroux being appointed foreman, they retired to consider of their verdict.

"After consultation, they returned into court with a verdict in the words and figures following, to wit: —

"From and according to the evidence adduced in this case, we, the jury, find the following verdict: —

"1. That, in the year 1796 and 1797, a grant of twelve leagues square of land, on the waters of the Bayou Liard or Siar and its vicinity, has been made by the Baron de Carondelet, as Governor-General of Louisiana, in favor of the Baron de Bastrop (according to the copies and plans thereof produced by the plaintiffs in evidence).

"2. That the location of said grant was, in pursuance of the orders of said governor, designated by Don Juan Filhiol, commandant of Ouachita, or by Don Carlos Laveau Trudeau, Surveyor-General of the Province of Louisiana; and that said Baron de Bastrop did, with the consent and approbation of the grantors, take possession of the land so granted, and proceed in carrying out the objects of said grant.

"3. That the conditions annexed to said grant, particularly that of introducing a given number of families and settling them on said grant, were fulfilled as far as the government could allow the said Bastrop, and that if said conditions were not fulfilled in whole, the non-fulfilment thereof was owing to the act and order of the grantors.

"4. That a plan of survey of said grant was made by Carlos Laveau Trudeau, Surveyor-General of the Province of Louisiana, and was confirmed in the year 1797 by the Baron de Carondelet, Governor-General of said Province.

"SILV. PEYROUX *Foreman of the Jury.*

"*New Orleans, 8th December*, 1847."

The cause was then taken up by the court. The attorney for the United States filed a supplemental answer, denying the right of the petitioners, to which a general replication was put in.

On the 23d of March, 1848, the trial of the cause was commenced before the court; the testimony was submitted to the court, and the argument of counsel on the part of the plaintiffs and defendants was concluded.

On the 31st of May, 1848, the following judgment was rendered, and entered of record: —

"This cause came on to be heard at the December term of the court, and was argued by counsel; and thereupon, upon an attentive consideration of the law and evidence, and the court being satisfied that the concession of twelve leagues square of land, situated on the waters of the River Ouachita and the

Bayous Bartholomew and Siard, in the Province of Louisiana, made in the years 1796 and 1797, by the Baron de Carondelet, then Governor-General of said Province, to the Baron de Bastrop, and commonly known as the "Bastrop grant," was a good, valid, and lawful grant to the said Baron de Bastrop, by a legal title in form, made by the Spanish authorities, and was protected and secured to him as his private property by the treaty between the United States and the French republic of the 30th of April, 1803.

"That the mayor, aldermen, and inhabitants of the cities of Philadelphia and New Orleans have proved a good title in themselves to those portions of said 'Bastrop grant' claimed in their petition, derived by various mesne conveyances from the original grantee and owner, the Baron de Bastrop.

"It is ordered, adjudged, and decreed, that the mayor, aldermen, and inhabitants of the cities of Philadelphia and New Orleans, in their several corporate capacities as cities, be declared the true and lawful owners of, and entitled to recover from the United States, the following-described tracts of land situated within the limits of the said grant, and be for ever quieted and confirmed as against the United States in the ownership and possession of the same, to wit:—

"Thirty-two thousand arpents of land acquired by Stephen Girard from Charles F. Morehouse, Ann M. Morehouse, Lucretia C. Morehouse, Eliza C. Sterling, and the heirs of Sophia L. Morehouse, by act of the 13th of January, 1824, before Oliver J. Morgan, parish judge and *ex officio* notary public for the parish of Ouachita.

"Two thousand arpents of land, more or less, acquired by Stephen Girard from Thomas Lovell, by act of the 9th of March, 1825, acknowledged before C. Pollock, notary public in and for the city of New Orleans, and ratified by said Lovell by act of the 3d of October, 1826, before Samuel G. Raymond, notary public in and for the State of New York.

"Eight thousand arpents of land acquired by Stephen Girard from George Y. Morehouse and Martha, his wife, by act of the 28th of April, 1825, before Thomas Adams, notary public in and for the State of New Jersey, at Burlington, in said State.

"Seventy-four thousand one hundred and sixty-seven arpents of land, more or less, acquired by the said Stephen Girard by a decree of partition between said Girard, James Lyle, and Robert E. Griffith, rendered in the year 1827 at the October term of the Seventh Judicial District Court for the parish of Ouachita, by the Honorable J. H. Overton, judge, in the suit entitled Stephen Girard *v.* Robert E. Griffith and the Representatives of James Lyle. The whole, according to the judgment and figurative plans of partition, filed in the aforesaid suit.

"All the share of Stephen Girard (ten twenty-first parts) in that part of four hundred and twenty-six thousand arpents of land, more or less, which has not been comprised in the aforesaid decree of partition, rendered in October, 1827, and which was acquired by Stephen Girard, James Lyle, and Robert E. Griffith, as tenants in common, from George Y. Morehouse and Abigail Morehouse, and their trustee William Griffith, by conveyance of the 29th of January, 1822, acknowledged on the same day before Thomas Adams, notary public in and for the State of New Jersey, at Burlington, in said State.

"Twelve thousand five hundred arpents of land acquired by Stephen Girard from John Carriere and Mary, his wife, by act of the 6th of November, 1819, before John Gill, notary public at Baltimore, in the State of Maryland.

"Four thousand three hundred arpents of land acquired by Stephen Girard by virtue of an act made before Oliver J. Morgan, parish judge and *ex officio* notary public for the parish of Ouachita, on the 22d of November, 1824.

"Twenty-three thousand nine hundred and sixty-four arpents of land acquired by Stephen Girard from George Hamilton, by virtue of a judicial sale thereof made by Jonathan Morgan, sheriff of the parish of Ouachita, on the 9th day of February, 1825, by virtue of a writ of execution issued at the suit of the syndics of Edward Brooks.

"Four thousand arpents of land acquired by Stephen Girard from Cæsar McLauchlin by act of the 11th of February, 1825, before Oliver J. Morgan, parish judge and *ex officio* notary public for the parish of Ouachita.

"Two thousand three hundred and forty arpents of land acquired by Stephen Girard from Thomas B. Franklin, by private act of the 11th of February, 1828, recognized on or about the 14th of March, 1828, before Oliver J. Morgan, parish judge and *ex officio* notary public for the parish of Ouachita.

"Thirty-six thousand five hundred and forty-nine arpents of land, more or less, acquired by Stephen Girard from John Adair, by act of the 10th of July, 1822, before Oliver J. Morgan, parish judge and *ex officio* notary public for the parish of Ouachita.

"Ten thousand acres of land acquired by Stephen Girard from John Casey, by act of the 9th of March, 1829, before Oliver J. Morgan, parish judge and *ex officio* notary public for the parish of Ouachita. Judgment signed June 12th, 1848.

"THEO. H. MCCALEB, *U. S. Judge.*"

From this decree the United States appealed to this court. The appeal was argued by *Mr. Crittenden* (Attorney-General),

for the United States, and by *Mr. Strawbridge* and *Mr. Soulé*, on behalf of the appellees, with whom was *Mr. John Sergeant*, representing the city of Philadelphia.

Mr. Crittenden made the following points.

1st. That the original concession to Bastrop (if any was ever made), or if not the original, then at least an official and authentic copy thereof, ought to have been produced, and was indispensable and essential to the maintenance of the claim of the complainants, and that without it their bill ought to have been dismissed.

2d. That the testimony which was offered and admitted for the purpose was inadmissible, and if admissible, was insufficient to establish the alleged grant to Bastrop, to prove its loss, or to warrant the introduction of secondary evidence for proof of said grant. The more, especially, as the claimants had not, in their petition, alleged its loss, or their inability to produce it, and had not, therefore, by their allegations, laid any foundation for the introduction of the testimony they were allowed to give.

3d. That the evidence which was offered and admitted to go to the jury, as to the former existence of said grant, or as to its loss, was illegal, and ought not to have been admitted on the trial; and, furthermore, that the verdict is not warranted by the evidence, and is in itself bad; finding conclusions of law, instead of matters of fact.

But, 4thly and chiefly, it will be insisted that the concession relied on by the claimants is not a concession to Bastrop, under whom they claim, and confers on him no title to the land in controversy. It is in its object and purpose, and in all material particulars, if not in terms and words, identical with that which was relied upon as a concession to the Marquis de Maison-Rouge, in the case of the United States *v.* King and Coxe, and was therein adjudged and decided by this court not to be a grant or concession to the said Maison-Rouge. 7 How. 833.

The decision made in respect to the Maison-Rouge concession is supposed to be in point, and decisive against the pretended concession to Bastrop, and against the present claimants.

In addition to his own argument, *Mr. Crittenden* sanctioned and adopted the following view, prepared by the District Attorney, which the reporter prefers to his own notes of the oral argument.

Every plaintiff who brings his suit against the United States under the act of 26th May, 1824, must show a claim to land founded either on a grant, concession, warrant, or order of

survey. The plaintiffs here allege their claim to be founded on a grant from the Baron de Carondelet to Bastrop; and if he made such a grant, it can scarcely be denied that their claim is good. His authority was competent; the date of the instrument brings it within the time prescribed by the first section of the act above quoted, and Bastrop was an inhabitant of the province at the time. It is believed that a fair examination of the instrument relied on will bring us to the conclusion, that there was not, and was not intended to be, any grant of land personally to Bastrop; and that he himself never asked for any land; that what is alleged to be a grant of land to Bastrop is, in truth, nothing but a contract entered into with him by the colonial government, whereby, for certain benefits and advantages stipulated in his favor, he was to undertake the personal trouble of bringing into the province, at the expense of the government, five hundred families of French royalists, to be settled on a defined tract of country, twelve leagues square, for the purpose of cultivating wheat; each of the families to receive a grant of four hundred arpents of land, and Bastrop to enjoy the monopoly of grinding the wheat at the flouring-mills he had already established on the Ouachita, and exporting flour free of duty to Havana; but not the slightest mention is made, either expressly or by implication, of any land granted to Bastrop himself.

The documents on which this claim rests, besides being in the record as already noted, may be found in a convenient shape in Matthew St. Clair Clarke's compilation of the laws of the United States in relation to Public Lands. Washington, Gales & Seaton, 1828, p. 951 et seq.

The first is the petition of Bastrop to Carondelet. This states Bastrop's intention of proceeding to the United States to procure the emigrant families; urges the necessity of the goverment's designating a district twelve leagues square, in which the families should be placed; points out the object of their introduction, to cultivate wheat and prevent the introduction of negroes; asks permission to export the flour to Havana; and declares that the government should pay the expenses of bringing in the families.

Now, this is not a petition for a grant of land, nor any thing like it; there are no words in the document by which the Baron de Carondelet, or any one else reading it, could possibly understand that Bastrop desired any land for himself. It will be seen by it that Bastrop had formed an establishment on the Ouachita. "The introduction of negroes and the making of indigo in that district," he says, "would cause your petitioner irrevocably to lose the expenses of his establishment." His

object is to increase the population in the vicinity with such settlers as would be useful to him, viz. those who cultivate wheat; a grant of land, no matter how large, to himself would not answer his purpose; it is not land he wants, but families; and he has not means, a royalist refugee himself, to bring these families into the province; he therefore prays the government to pay the expenses of their transportation hither. But the families themselves would not come simply for the purpose of promoting the interested views of Bastrop. What then? He prays the government to induce them to come by a gratuity of four hundred arpents of land to each family. It is plain, then, that Bastrop does not ask for any land for himself in so many words, nor does he by implication; but he asks that concessions should be made to the settlers. Now, had he intended to ask for the land for himself, why should he pray that the government should make concessions to the settlers out of the very land which was all to be given to him, and when he himself could, if his pretended prayer were granted, give them as much as he pleased himself? With what grace could he think of asking for so unusual and enormous a grant of land for himself, when not only was he offering to do nothing personally for the government, but is calling upon it to incur heavy expenses in bringing in the immigrants, whose labor was to be highly beneficial to himself, and to grant him peculiar commercial favors and privileges not accorded to other inhabitants of the province. Bastrop, then, asks for no land for himself. Does Carondelet grant him any?

The next document (on page 952) will answer. It is the decree of Carondelet on the foregoing petition, and, as was usual, indorsed on the petition itself. Its terms are entirely responsive to the prayer. There is not one of them, and no word of them, indicating a grant of land to Bastrop himself personally, or insinuating in the lightest degree that Carondelet supposed that Bastrop had asked him for any land. He recognizes the advantages which will flow from Bastrop's project; directs the commandant of Ouachita to designate the twelve leagues square, — not *which are to be granted to Bastrop*, and such would have been the expression had a grant been intended, — but "for the purpose of placing thereon the families which the Baron may direct"; undertakes to pay the expenses of the families, and limits the number to be brought in to five hundred. The conclusion of this decree is fully expressive of the intention of the governor, and demonstrates, if farther proof were indeed necessary, that he had none of giving land to Bastrop. The words are these: "After the lapse of three years, if the major part of the establishment shall not have been made good, the

twelve leagues square destined for those whom the petitioner may place there shall be occupied by the families which first present themselves." Here we have the destination of the twelve leagues square plainly stated, and it is not to be the property of Bastrop.

The next document will be found on the same page, 952. It is in the form of an approval by Carondelet of the location of the twelve leagues square, made by the surveyor-general, Trudeau, and declares that "we," the governor, "do destine and appropriate the aforesaid twelve leagues, in order that the said Baron de Bastrop may establish there, in the manner and under the conditions expressed in the said petition and decree." This was the order given by Carondelet after the survey had been made, and, equally with the decree upon Bastrop's petition, contains no words that can be construed into a grant of land to him. If these instruments, on which alone the plaintiffs' claims rest, so far as the twelve leagues square are concerned, contain no words of grant, nor any words equivalent thereto, how can plaintiffs recover?

By the common law, "Grants, concessions," are "the regular method of transferring the property of incorporeal hereditaments, or such things whereof no livery can be had." "It therefore differs but little from a feoffment, except in its subject-matter; for the operative words therein commonly used are *dedi et concessi*, have given and granted." See 2 Blackstone's Commentaries, 317. So "a feoffment" "is the most ancient method of conveyance, the most solemn and public, and therefore the most easily remembered and proved. And it may be properly defined *a gift* of any corporeal hereditament to another." "The aptest word of *feoffment* is *do* or *dedi*." See 2 Blackstone's Commentaries, p. 310. The common law author here lays down, not only the principle of his own system, but of universal reason; for it is a maxim, applicable to all systems and known in all idioms, that no one is easily to be presumed to give away what belongs to him. *Nemo facile presumitur donare.* Governed by the reason of this maxim, the common law requires expressly, in the concession of corporeal or incorporeal hereditaments, absolute words of gift; and, governed by the same reason, every tribunal, no matter where sitting or under what system, will decide that A has not given any thing to B. by written conveyance, unless the instrument uses words of *gift*, or words implying *gift*, and equivalent to it. Measured by this standard, the instrument relied on as a grant of land to Bastrop utterly fails.

It would be quite impossible to find any instrument, which has ever been decided by the courts of the United States to be

a valid grant of lands, that did not contain the express words of grant. To support this position, any case may be looked into which came up to the Supreme Court of the United States from Florida or Missouri, under the laws permitting parties to bring suit to test the validity of their claims to lands in those States. We may cite U. States *v.* Arredondo, 6 Peters, 692; Same *v.* Percheman, 7 Ib. 54; Same *v.* Clark, 8 Ib. 440; Same *v.* Richard, 8 Ib. 471; Same *v.* Hernandez, 8 Ib. 485; Same *v.* Delassus, 9 Ib. 123, 124; Same *v.* Clark, 9 Ib. 168; Same *v.* Burgoin, 13 Ib. 85; Same *v.* Arredondo, 13 Ib. 133; Same *v.* Rodman, 15 Ib. 136; Same *v.* Delespine, 15 Ib. 231.

Every one of these has, in express terms, what the Bastrop claim has not, either expressly or by implication,—direct words of grant.

Under the system of rules and regulations adopted by Spain for the settlement and disposal of the public lands of her colonies, contracts between the government and individuals for the introduction of settlers, of which this contract with Bastrop is one, were well known. They sometimes contained a grant of land to the contractor, and sometimes not; the former was an incident, and not of the essence of the contract, and many were made without it. As an illustration, attention is called to the case of the United States *v.* Arredondo and others, 6 Peters, 692. In this case, Arredondo and son present a petition to the Intendant, Don Alexander Ramirez, offering to form an establishment of two hundred families at a place called Alachua, which they undertook to bring in at their own cost, provided they should obtain, in absolute property, a grant of four leagues of land. Whereupon Almirez issues his decree, in which he uses these words: "I grant to them the part which they solicit of the said tract belonging to the royal domain."

Here is the most striking contrast to, or indeed the very opposite of, the petition and decree in the Bastrop case. Arredondo asks for a grant of land to himself; Bastrop does not. Ramirez *grants* to Arredondo a tract of land. Carondelet uses no such word in relation to Bastrop. Bastrop and Arredondo are both petitioning officers of the same government, acting under the same system of laws; but their petitions are different, and the decrees are different. How, then, can they both be made to mean the same thing?

In looking further into the Bastrop papers (see Laws relating to the Public Lands, p. 953), we find a petition from Bastrop to Carondelet, dated New Orleans, June 12, 1797, fully two years after the original petition praying to be allowed to bring in his settlers, and in this "he begs a grant, along the Bayou Bartholomew from its source to its mouth, of

six toises on each bank, to construct upon them the mills and works he may find necessary," &c.; and on the same page is found the decree of Carondelet on this second petition, saying: "I grant him, in the name of his Majesty, and by virtue of the authorities which he has conferred upon me, liberty to the Bayou Siar," "I also grant him the exclusive enjoyment of six toises of ground on each side of the Bayou Barthelemi, from its source to its mouth." Now, if there were nothing else, this alone would be conclusive against the construction attempted to be put upon the petition of Bastrop and decree of Carondelet in 1795, by which the plaintiffs claim a grant of twelve leagues square; for on examining the plat of survey of Trudeau of the said twelve leagues square, it will be found that this very Bayou Bartholomew runs right through the middle of it. Hence the fact is clearly demonstrated, that the proceedings in 1795 were not a grant of land, because, if granted to him already in 1795, Bastrop certainly would not pray, in 1797, for a grant of six toises on each side of the Bayou Bartholomew, as the decree in 1795 would already have given him, not only six toises, but many miles deep on both sides of that bayou. Note, too, the mode in which Bastrop asks for these six toises; he thinks it necessary to apologize for making so large a demand. "This request, Sir," says he, "will not be considered exorbitant, when you are pleased to observe that your petitioner, who will expend in these works twenty thousand dollars, will be exposed, without these grants, to lose all the fruits of his labors." How ridiculous to suppose that a man, who had already asked for and obtained one hundred and forty-four square miles, would think it necessary to excuse himself for making a modest and reasonable application for six toises! How still more ridiculous to suppose that a man, who had already obtained a grant of twelve leagues square, would within two years apply for a grant of six toises of the very same land, included in the very same twelve leagues square!

The foregoing considerations would appear to be conclusive against the plaintiffs' claim; but another may be added, of importance not only in this, but in many other suits brought against the United States. If this be, as plaintiffs allege, a grant to Bastrop, was the grant perfect or inchoate at the date of the cession of the country to the United States? If the grant were perfect before that time, then it does not come under the act of 26th May, 1824. Such a grant was protected by the treaty of Paris; it had no need of an act of Congress to assist it; it has been repeatedly decided by the tribunals of Louisiana, and the principle is recognized by the Supreme

Court of the United States, that a party claiming land by virtue of a Spanish or French grant, perfected before the cession, could maintain successfully his action of ejectment against a possessor under a subsequent title, even if that title were a patent from the United States. The act of 1824, therefore, was not intended to afford parties an opportunity to sue the United States in cases where those parties could have relief against individuals in possession, but to grant a remedy to those whose rights were not perfected at the date of the treaty, and whose claims were of such a character as, though imperfect, were binding on the conscience of our predecessors; and to those whose claims, even when perfect grants, were derived from the officers of Spain who remained in possession of the country subsequently to the treaty of St. Ildefonso, up to the date of the actual surrender of the province to the authorities of the United States, all such grants, without exception, having been declared null and void, except certain cases of actual settlers, by the stringent provisions of the 14th section of the act of March 26th, 1804, entitled "An Act erecting Louisiana into two Territories, and providing for the temporary government thereof." 2 Statutes at Large, 287.

But if this claim of Bastrop were only an inchoate grant at the time of the cession, then it is incumbent on the plaintiffs to show that it was prevented from being perfected by the transfer of the country to the United States; for the first section of the act of 26th May, 1821 (4 Statutes at Large, 52), provides, among other requisites of the claims whose validity may be tested in the District Courts of the United States, this one, — that they "might have been perfected into a complete title, under and in conformity to the laws, usages, and customs of the government under which the same originated, had not the sovereignty of the country been transferred to the United States"; showing that Congress only intended the United States to be sued (for this is a law which must be construed strictly in favor of the government) in those cases where the transfer of the country prevented the perfection of the plaintiff's title. Now it is incumbent on the plaintiffs to show that such was the fact. In the present case, however, it is clear that, as the Spanish officers were in possession of the country during more than eight years after the commencement of Bastrop's proceedings, if he ever had a grant, he could within that time have got it completed, and as he did not, the cause must lie in some other circumstance than the transfer of the sovereignty to the United States; he fails, therefore, in one of the essential features of all suits that can be brought under this act of Congress.

On the part of the appellees there were three elaborate briefs filed, by *Mr. Strawbridge*, *Mr. Soulé*, and *Mr. Sergeant*, and the case was fully argued orally by the two first-named counsellors. From all these materials, the reporter is perplexed to make a selection to present to the reader. Each of the counsel covered the whole ground in his argument. The two most essential points were, 1st, the power of the Governor-General to make such a grant, and the laws under which it was made; and 2d, what was the nature of the contract or grant. As bearing more particularly upon the first, the views of *Mr. Strawbridge* are presented, and upon the second, those of *Mr. Soulé*.

After examining the various muniments of title *Mr. Strawbridge* proceeded as follows.

Such are the title-deeds proper of the "Bastrop grant." To any person conversant with the ancient Spanish laws, its character and object are unmistakably obvious. Philip Henry Neri de Bastrop was what is termed a *poblador* or colonizer. The word, as defined by Salva, signifies "he who peoples; founder of a colony,—*urbium seu coloniarum conditor*." His contract was of a kind familiar to the laws of Spain. It was the policy of that country, as it is now the policy of our own, to encourage the population of her vast and magnificent realms, which lay almost valueless until their resources could be developed under the influence of civilization. One of the most ready, as well as least expensive, means of effecting this object was, by granting large tracts of land to the hardy and enterprising adventurers who were willing to follow fortune into the unexplored wilderness of the New World, whether singly or bringing followers in their train. To such, the reward would naturally be proportionate to the services rendered. Every man became an acquisition to the country, and as land cost nothing to the crown, it was liberally bestowed. To men of note, or eminent for their services, a province formed no very generous guerdon. Cortés received a principality; other conquerors, discoverers, and colonizers were rewarded with grants of various extent and value. The solitary emigrant, even without friends or influence, had only to ask in order to receive, on easily performed conditions, such as actual cultivation and occupancy, an ample property in fee simple to him and his heirs for ever. All grants were held by mere allodial tenure, and were almost invariably irrevocable; always so in the absence of any clause to the contrary. They were greater in New than in Old Spain.

"Our ancient legislators," writes Guarinos, Historia de Vin-

culos y Mayorazgos (Entails and Primogeniture), chap. 11, p. 150, "to repeople, cultivate, and defend the lands they conquered, endeavored to establish (*arraigar*) upon them families of all classes, by means of great favors, franchises, and donations. The spaces of lands, allotments, and *caballerias* were not equal in all places, varying greatly, according to the greater or less extent of the territory, the importance of its repeopling, its situation more or less immediate to enemies, and other circumstances. For this reason the *caballerias* (a knight's share or fee) and *peonias* (a foot-soldier's share) were much more liberal generally than in Spain."

The pobladores were specially favored. For their services in introducing emigrants, and settling them in districts allotted to their reception, they not only became entitled on performance of their contracts to such portion of the designated tracts as was not reserved to the use of the subordinate colonists, or, if none had been actually marked out, a concession varying according to the express or implied terms of the contract, and the importance of the colony; but they were also rewarded with numerous marks of honor and distinction. The celebrated body of laws, known as the Recopilacion de las Indias, promulgated about 1680, for the regulation and government of the Hispano-American possessions, and repealing or superseding all contrary enactments, so far as concerned those countries, treats expressly of colonizers, colonists, and colonies. By Tom. II. book 4, title 5, law 11, pobladores, their heirs or children, became vested with full civil and criminal jurisdiction over their respective colonies, with the power of appointing alcaldes and other inferior officers. By various laws of the following title of the same work, they were exempted from imposts and taxation, privileged to wear armor offensive and defensive, recommended to the special care and favor of all governors and viceroys, and to honorable promotion of every kind, and ranked among the nobility of the land. The chapter in question is curious; it contains not a law that does not confer some mark of favor or distinction on discoverers and colonizers, so highly were their services esteemed.

Between those who colonized the country, and those who founded cities, towns, &c., a distinction was drawn, and the rules respecting them and their rights vary, but not materially. Title sixth of the Recopilacion de las Indias, treats, as just observed, of the honors and preferments conferred on both alike; title seventh, chiefly of urban settlements; and title fifth, principally of rural colonies and their colonizers. It is this title which I propose briefly to translate and examine, as from its provisions it will be at once perceived that the rights of the

principal colonizer to the surplus of land in a *poblacion* or settlement, after his colonists had been located, was a legal right, incident to the contract, arising out of the law itself, and wholly independent of and unimpaired by the absence or presence of words of conveyance to him in the instrument of concession.

The first five laws of the fifth title relate merely to the selection of good, healthy, and accessible lands and localities, to the salaries of officers, the employment of Indians, &c., &c.; and, like very many of these laws, are only recommendatory in their provisions. A translation of them, more classic than close, may be found at p. 33 of the Appendix to Vol. II. of the Land Laws, compiled by Matthew St. Clair Clarke in virtue of a resolution of the House of Representatives of March 1st, 1833, and also in Vol. II. p. 44, of the book known as White's Recopilacion. I quote, however, from an original Spanish edition, printed at Madrid in 1756, by authority.

Lib. 4, tit. 5, Law 6: — "If the fitness of the country should afford opportunity for colonizing some town with Spaniards, with a council of ordinary *alcaldes* and *regidores*, and there should be a person who will undertake a contract to settle it, let the agreement be made, with these requisites: That within the period which may be allotted to him he shall have at least thirty inhabitants, and each one of them a house, ten breeding cows, four oxen, or two oxen and two young bulls, one breeding mare, one breeding sow, twenty breeding ewes of Castile, and six hens and a cock. He shall in like manner nominate a priest, who may administer the Holy Sacraments, who shall, the first time, be of his own selection, and afterwards according to our royal presentation; and he shall provide the church with ornaments and articles necessary to divine service. And he shall give security that he will accomplish it within the time aforesaid; and if he do not complete it, let him forfeit what he may have built, constructed, and cultivated, which we appropriate to our royal patrimony; and let him, moreover, incur a fine of a thousand dollars of gold for our exchequer. And if he should fulfil his obligation, let there be given to him four leagues of boundary and territory, in a square or oblong, according to the quality of the land, of such form that, if the limits should be marked out, they may make four leagues square; with this requisite, that the limits of said territory should be distant at least five leagues from any city, town, or village whatever of Spaniards, and that prejudice be done to no village of Indians or to a private individual."

The next law relating to rural colonies is to be construed in connection with the preceding, as appears by the context. It runs thus, including the caption: —

Law 7th. "That there being a contract for a greater or smaller number of inhabitants, it is to be granted with boundaries and territory corresponding, and with the same conditions."

"If there be any one who will obligate himself to make a new settlement in the manner provided, of more or less than thirty inhabitants, providing there be not less than ten, let there be granted *to him* boundaries and territory proportionate, and with the same conditions."

Now, if the introduction of thirty families entitled a poblador to a tract of four leagues square, how many leagues would he be entitled to on introducing 500? De Bastrop was evidently restricted by the terms of his contract from claiming all that he might have claimed in the absence of a special allotment by metes and bounds.

The 8th law simply provides that the children and relatives of colonists are also to be considered as settlers, if married.

Law 9th. "That the chief poblador shall contract with each individual who may enrol himself to settle."

"In the contracts for new settlements, which the governor, or the person who may have that power in the Indies, may make with a city, adelantado, alcalde, mayor, or corregidor, the person who may take the contract shall do likewise with each one of the individuals who may enroll themselves to settle, and shall obligate himself to give in the settlement designated lots for building houses, arable and pasture lands, in such quantity of *peonias* and *caballerias* as each one of the settlers may obligate himself to construct, so that he do not exceed or give to each one more than five *peonias*, nor more than three *caballerias*, according to the distinction, difference, and measure expressed in the laws of the title on the distribution of lands, lots, and waters."

Law 10th. "That when there is no private colonizer, but married inhabitants, the settlement is granted to them, provided they be not fewer than ten."

"When some particular individuals shall unite in making a new settlement, and there shall be the requisite number of married men for the purpose, let permission be given them, so that they be not fewer than ten married men; and let boundaries and territory be given to them, according to what has been already said; and we grant them power to elect among themselves ordinary alcaldes and annual officers of the council of the settlement."

Analogous to the above are some laws from book 4, title 7, of the Recopilacion, concerning the colonization of cities and towns (not rural colonies, like the present).

Law 7th. "That the tract is divided between him who makes the contract and the settlers, as is ordained."

"The tract and territory that may be given to a colonizer by contract is divided out in the following manner: let there be first taken what may be necessary for lots of the settlement, and suitable commons and pasture-grounds in which the cattle which the inhabitants must have may graze abundantly, and as much more for the corporation lands of the place; the rest of the tract and territory is to be divided into four parts; that part which he may select shall belong to him who is obliged to make the settlement, and the other three are to be divided out by lot equally to the settlers."

The other laws of this title relate chiefly to the size and arrangement of streets, squares, churches, dwellings, &c., and must be considered, not as imperative and strictly obligatory, but merely recommendatory in their provisions. Among others, the 25th law confers that power of prorogation of contracts which was necessarily exercised, as a mere matter of justice, by the Baron de Carondelet, in consequence of the arbitrary order contained in his official letter of June 18th, 1797:—

"If by reason of the occurrence of some fortuitous event, the colonizers should not have completed the settlement within the time specified in the contract, let them not lose what they may have expended or erected, nor let them incur the penalty; and the person governing the country may prolong it as the case may require."

Lastly, I quote from book 4, tit. 12, law 4, of the same Recopilacion, concerning the sale, composition, and distribution of lands, lots, and waters.

Law 4th. "That the viceroys may give lands and lots to those who go to colonize."

"If in the discovered parts of the Indies there should be some sites and districts so good that it may be proper to found settlements, and some persons should apply to make a contract and form a colony on them, in order that with better will and usefulness they may do so, let the viceroys and presidents give them, in our name, lots, lands, and waters, in conformity to the situation of the country, so that it be not to the prejudice of a third person, and be for such time as may be our will." *

* The following was cited, also, to show the power of the Spanish governors to make such grants as that to Bastrop, and that no confirmation by the king was necessary. It was omitted in the translation of the laws annexed to White's Recopilacion and Clarke's Land Laws.

Book 4, tit. 1, law 4, Laws of Indies. "Of Discoveries."

"We establish and command that no person, of whatever state and condition he may be, shall of his own authority make any discovery by land or sea, nor entry, new settlement, or stock-farm in what has been or is to be discovered in our Indies, without our permission and provision, or that of whoever may have our power to grant it, under penalty of death, and of forfeiture of all his property for our chamber. And we command the viceroys, audiences, governors, and other authorities, not to give permission to make new discoveries without consulting us, and having our

Other laws *in pari materia* exist. By law 24, tit. 3, lib. 4, the chief colonizer is authorized to establish the right of primogeniture and entail to all that may have been granted to him. By law 3, tit. 5, lib. 4, they are authorized to convey to each settler a sub-concession not exceeding five *peonias*, or four *caballerias*. And from the definition of these measures contained in law 1, tit. 2, of the same Recopilacion, as well as from Escricha, Dictionario de la Jurisprudencia, *verb.* "Medida," where he gives the relative proportions of Spanish measures, it is apparent that De Bastrop contracted to narrow down very materially his own sub-concessions below the legal maximum.

Although it might seem, from the closing sentence of the law last recited, that grants to *pobladores* were revocable at will, such, nevertheless, was not the case, unless some clause to that effect had been especially reserved in the deed of concession. By book 3, tit. 5, law 1, of the Novissima Recopilacion de Castilla, and book 3, tit. 12, law 8, of the Fuero Real, which embody the general laws of the realm, it is provided that gifts bestowed by the king cannot be revoked without the fault of the grantee, and pass to his heirs. So by 4th Febrero, part 2, lib. 2, cap. 2, § 3, and No. 115, it is held, that royal donations should be liberally construed; and if such a donation be made to two persons conjointly, and one of them die without heirs, his portion accrues to the surviving donee. In like manner, law 234, page 74, of the Leyes del Estilo, declares, that he who receives a donation from the crown may do with it as he pleases. And Elizondo, in tom. 5, part 2, cap. 6, § 8, writes: "There is no doubt that things which sovereigns bestow upon any person, they cannot afterwards deprive them of, nor prevent them from doing with as they may desire, as well as with their other property; more particularly if the gift be conferred on account of the merit of the person favored, the donation rising then to the force of a contract."

The kings of Spain themselves have repeatedly disclaimed any such power of issuing letters revocatory. "Let such letters, if obtained, so far as regards their abrogation or derogation, or any other thing therein contained, whereby the just and legal rights of a party are taken away, be of no avail, nor have any force or vigor whatever; let such letter be as if it had never been given or obtained." — Montalvo, Ordenanzas Reales de

special license. But where the country may have been already discovered and peaceful, we permit them to give leave within their jurisdictions to make the settlements (*poblaciones*) that may be fit, observing the laws of this book, provided that, when the settlement is made, they send us forthwith a report of what they may have executed; and as to the power of viceroys for new discoveries, let the 28th law, tit. 3, lib. 3, be observed in the cases which it comprises."

Castilla, lib. 3, tit. 14, law 7, p. 723; also tit. 12, p. 672, &c., and p. 678, whence I quote.

Of the powers of governors-general to grant lands and to contract for their colonization, I believe there can be no doubt whatever. The very laws referred to not only authorize, but require it. By various other statutes of tom. 2, lib. 3, tit. 3, of the Recopilacion de las Indias, viceroys and governors of the American provinces of Spain are invested with nearly all the authority of royalty itself. No modern procuration could be more plenary than the second law of this title; no ukase or firman more imperative in commanding obedience to them on the part of Spanish subjects. It confers powers without other limit or restriction than may be provided by law; the viceroy may do all that he is not specially and directly prohibited from doing. And we learn from De Mesa, Arte Historica y Legal, lib. 2, No. 91, that the titles of viceroy, captain or commandant general, and governor political and military, are synonymous. The question of their power to grant has been repeatedly settled. See De Armas et al. *v.* The Mayor, 5 La. Rep. 132; Arredondo's case, 6 Peters, 728; Delassus *v.* The United States, 9 Peters, 117; Chouteau's Heirs *v.* The United States, 9 Peters, 147; Pollard's Lessee *v.* Files, 2 Howard, 591; Soulard et al. *v.* The United States, 4 Peters, 591. *A fortiori* they had the power to alienate lands of the royal domain for a valuable consideration.

Such are the Spanish laws under which this grant was made, and by which its intent, meaning, and validity must be tested. They had not merely such force as the common law of England exercised over her colonies, but were enacted expressly for the government of all the American possessions of the Spanish crown. They may strike us as strange or unwise, yet are not the less valid on that account, and certainly must appear less extraordinary to an American court than the forms and provisions of the common law would seem to a Spanish tribunal, when a discussion should arise about an entailed estate, with its fines, contingent remainders, and common recoveries. De Bastrop's grant is assailed and treated as void for the alleged absence of words of conveyance, as if it had originated under the common law. Yet, were such words wholly wanting, which is not the case, the clear and unequivocal laws under which it was really made supply that want, and interpret the meaning and effect of the deeds. They form, so to speak, the *constitution* of the grant; and such as they were impressed upon it at its birth, they must ever continue. But could any Spanish tribunal, uninitiated, ever so far penetrate the antiquated nonsense of a writ of ejectment as to discover

its real object and effect, plain as it may be to men versed in the common law? And when, on referring for information to the lawyers of the land, the Spaniard should discover that the object of a common recovery suffered by a tenant in tail was to effect what was most positively prohibited by law (Blackstone expressly says that "they are fictitious proceedings, introduced by a kind of pious fraud to elude the statutes *de donis, de religiosis*, &c."), what would be his astonishment at finding that universally held right and lawful which wore every aspect of illegality, and was in fact illegal? A Spanish judge would probably nullify a title held by virtue of such proceedings, and would blunder in so doing. Such is a single instance of the difficulties and dangers which beset an examiner into the unfamiliar laws and legal forms of a foreign country. I therefore ask, that, if at the close of this argument any doubt should remain upon the mind of this court, the claimants may have the benefit of that doubt; that the object, meaning, and effect of De Bastrop's grant, as made probable, or rather certain, by the deeds themselves, by corroborating documents, by extrinsic evidence, by the contemporaneous and almost prescriptive interpretation of popular opinion, as well as of history, by the known laws and policy of the Spanish government, and by the opinion of the jury and of the court *a quo*, may have more than ordinary weight; and that forms of concession followed more than half a century ago in a foreign land, by its highest officers, may not be nullified as meaningless and void, because they do not conform to the ideas of men belonging to a later and widely different age, race, government, and generation; or, if annulled, that it may not be except upon the most clear, palpable, positive evidence of their utter worthlessness and illegality. I invoke, in short, the old, trite, terse law-maxim, "*Omnia rite acta*," &c.

Mr. Soulé.

Point No. 2.— Rights of the claimants under the title which they exhibit.

These will depend, —

1. On what construction is placed upon the terms in which it is executed; and,

2. If the terms be such as to confer only imperfect rights, upon the concomitant circumstances which may entitle the claimants to have them perfected into complete ones.

Taking the instrument to be unobstructed by any suspensive clause, absolute *ab initio*, or, in other words, unconditional, its bearing and import, it is respectfully submitted, are according to the usages, customs, and laws prevailing in Louisiana at

the date of its execution, so void of ambiguity, and expressed in a language so eminently *sacramental*, as Spanish jurists would say, that they admit of no possible controversy, doubt, or evasion. They are the most proper terms in which the special thing which they were intended to effect could be conveyed; and the slightest attention to their obvious meaning will convince the court of their legitimacy and fitness.

In the original *requête* which he addresses to Governor Carondelet, Baron de Bastrop sets forth, "That it is indispensably necessary, on the part of the government, that there should be designated a district of about twelve leagues square, in which may remain included the Bayou Siard and its vicinity, in order that, without the least obstacle, those families may proceed to settle upon them, which the applicant is going to introduce, under the express condition that concessions of land are to be *gratis*, and that under no title or pretence can they exceed the quantities of 400 arpents at most," &c., and he prays that the government be pleased to fix the number of families which he is to introduce.

The words by which the district is thus to be separated from the king's domain, in this incipient *requête*, are, "*Es absolutamente indispensable que per parte del gobierno se destine*," &c. By referring to one of the most accredited authorities on Spanish philology (Salva's Dictionary), your honors will find that the word *destinar* is the proper one to express the idea which the applicant meant to convey. "DESTINAR: *Determinar alguna cosa por algun fin o efecto*."—"To determine something to some end or purpose." It was usual that, upon such requests (Diligencias), the order of the governor should issue; and this was done either by inserting at the foot of them the formal words, "*Como lo pide, despachase par secretaria en la forma que solicita*"; or by an extended order expressing the assent of the Governor, in the very words of the *requête*, as in the present case for instance, where the order reads: "*Juan Filhiol Señalara doce leguas en quadro, mitad del lado de Bayu Siard, mitad del lado de enfrente del Ouachita, para ir colocando en ellas las familias que el enunciado Baron fue dirigiendo*," &c.—"Don Juan Filhiol will designate twelve leagues square, half on the side of Bayou Siard, and half on the side opposite to the Ouachita, that the families which the aforesaid Baron is conducting may locate there," &c.

And thus, from the words of the contract entered into by the Baron de Bastrop with Governor Carondelet, these twelve leagues, so pointedly designated, were to be assigned, to be constituted — for what? "*Para ir colocando en ellas las familias*," &c.—"That he might locate the families," &c. (Salva's

Dictionary.) They were, therefore, from that moment, separated from the royal domain, and once so separated, could not be resumed, except through the fault of the grantee. Had the claimants under De Bastrop no other title but that, they would still be vested by it with certain rights, inchoate, it is true, yet such as would be recognized by this court, who would feel bound in all justice and equity to perfect them by their decree, unless it were clearly shown that they had been surrendered or forfeited.

If this contract contemplated no actual grant of the lands designated in it, but was merely intended as an adjustment of the relations in which the emigrant families should stand to the government, where is the necessity of marking out twelve leagues square, or something like 1,016,264 arpents? The number of families to be located thither under the contract was fixed at five hundred. They were to have 400 arpents each, or 200,000 arpents in all. What was to become of the remainder? The crown could no longer dispose of it, without a flagrant violation of its faith. The emigrant families could not claim more than what was allotted to them. To whom were to go the remaining 816,264 arpents? To whom I ask it. Here is a difficulty which must be got over before it can be maintained that the grant only transferred from the public domain what each family was to take for itself. The words are clear, their meaning is unmistakable. The twelve leagues square are asked to be set apart, and are constituted for the establishment which De Bastrop was to form on Bayou Siard, and in consideration of his introducing there the five hundred families, to whom he was in his turn to make grants agreeably to the terms of his contract. "*Bien entendido que a ningun se ha de dar mayor concession de tierra que la de quatro cientos arpanes.*" "It being understood that to none shall there be given a greater concession of land than that of 400 arpents." This restrictive clause in the condition imposed upon De Bastrop to grant lands, could only enure to his benefit. It could not affect the king, if the lands not conceded to the individual settlers were to remain public property. Besides, it would only bind him as much and as long as he chose to be bound. And if the domain was to be bound by any such restriction, it was equally bound by the other parts of the contract; and the twelve leagues having once been severed from it, the 816,264 arpents remaining, after awarding to the settlers what had been stipulated in their behalf, would have remained for ever waste property! If De Bastrop had no claim over them, certainly the individual settler had none, and the king least of all, for he had parted with them. He had parted with the twelve integral

leagues for the benefit of De Bastrop's establishment. He could no more violate this than that part of the contract. The contract was absolute as to the quantity of the lands designated and constituted, and conditional in so far only as it was to have no effect unless Bastrop should comply with the obligations which he had assumed in it. And, pray, what was to be the forfeiture in that case? The nullity of the grants which he might have made to individual settlers? By no means. But if Bastrop should not make good within three years the greater part of the establishment, the twelve leagues square destined for the families he was to send were to be occupied by the first families who might present themselves.

Should, therefore, De Bastrop make good his obligations, the twelve leagues were to remain exclusively in his establishment, and to be occupied by himself and the five hundred families which he was to settle there. The argument is conclusive. De Bastrop was certainly comprised in the establishment; he was its head, its ruler; the five hundred families introduced by him thither were not to have more than 400 arpents each, or 200,000 arpents in all. To whom, I ask again, were to revert the remaining lands?

I have said, that, if the contract was not intended to convey a grant of lands to the extent claimed in the *requête*, there could be no necessity for executing another instrument; the first was binding of itself. Indeed, according to the interpretation which is put upon its terms by those who view them in a different light from what I do, it required only at the hands of the government that successive grants should be awarded to the families as they should present themselves under its provisions. The spot where the establishment was to be located could not be mistaken. It was amply described and most pointedly marked out. What surveys were required but such as might be necessary to set apart for every family of emigrants what each was entitled to?

But this assumption cannot bear the least scrutiny. It has no solid basis to stand upon. As well attempt to lay in the air the foundations of a large structure, or to build up a tower on moving sands.

But I proceed.

The contract was in progress, and the contractor rapidly advancing to its completion. Governor Carondelet considers that the time has come for him to give it a more formal shape, and he determines to "designate the twelve leagues destined for said establishment in the terms, with the metes, landmarks, and boundaries, and in the place which is designated, fixed, and marked out by the figurative plan and description affixed

at the head of this title, which are made out by the Surveyor-General, Don Carlos Trudeau, it having appeared to him (Carondelet) most expedient to avoid all contestation and dispute, and approving them," &c., &c.; and he "destines and appropriates the aforesaid twelve leagues, that the said Baron de Bastrop may establish them in the terms, and under the conditions, expressed in the petition and decree of the 20th and 21st of June, 1796."

The twelve leagues had heretofore been but "designated, marked out," *destinadas, senaladas;* now they are both "designated and appropriated," *destinamos y apropiamos*, says the grant. "APROPIAR: *hacer propia de alguno qualquier cosa*" (Salva's Dict.); — "*rem alicui adjudicare*," or "to make something the property of another, to adjudicate a thing to somebody." The court perceives that the property is fully transferred by these terms, and that it has gone out of the domain.

That this paper is a grant, who can doubt that reads with the least attention its contents? The governor calls it a title, *titulo*. Speaking of the plan and description by Laveau Trudeau, he says: "The plan and description affixed at the head of this title," — "*el plano figurativo y diligencia que van por caveza de este titulo.*" Yes, a *titulo*, which the Spanish jurisconsults call *titulo en forma*, and the French *un titre translatif de propriété;* — "a title in form; a title transferring property." And the best evidence that it was so considered is in the fact that the plan affixed to, and made an integral part of, the same, bears on its face, and as its caption, CONCESSION, *grant:* CONCESSION BASTROP, *grant to Bastrop.*

But there are other evidences extant of the meaning and import of that paper, — evidences of high character, too. — of undisputed and indisputable authority.

About ten days before its execution, to wit, on the 10th of June, 1797, Baron de Bastrop complains, "that the twelve leagues which have been granted to him by his contract are found in part overflowed and occupied by ancient inhabitants"; and he prays the governor "to grant him the same quantity of land, &c., &c., without prejudice to the lands which his lordship has granted to the Marquis de Maison-Rouge," &c., &c.

"*Don Felipe de Bastrop tiene la honra de observar a V. S. que las doce leguas en quadro que V. S. le ha otergudo por su contrato se hallan en parte aneyadas y ocupadas por antiguos habitantes; en cuya virtud, a V. S. suplica se sirva tener á bien concederle la misma cantidad de tierra,*" &c., &c.

This request Carondelet indorses as follows: "*Como lo pide, despachase per secretaria en forma que solicita.*" — "As he requests, let it be despatched in the form which he solicits."

Is that enough? What else is wanted? We have something more. We hold a paper, without a date on its face it is true; without a name at its foot; yet a paper of an unmistakable character, and, may I not say, of some considerable dignity. It is apparently an elaborate essay on the practical workings and results of an operation based on the plan of colonization proposed by De Bastrop. It is proved to be in the handwriting of Francisco Bouligny, who was from 1796 to 1800 Lieutenant-Governor of Louisiana, and for some time within that period acting governor, in the absence of the titulary. It refers in express terms to the Bastrop contract, and therefore must have been written after its execution; and as Bouligny's death occurred some time in 1800, it traces itself, naturally, to an epoch not suspicious (from 1796 to 1800), when these matters were still fresh in the memory of those who spoke of them or wrote about them. It emanates from one high in power, and, in all probability, had its origin in the exigencies of his official duty.

Let us look into it and see what light, if any, it throws on this transaction. After going into a detail of the expenditures to be incurred by the Baron de Bastrop, in order that he might give value to the lands granted to him, and after showing that he could effect it only by introducing at his own cost two thousand families, he comes to the result, "that he will have purchased the 800,000 arpents" remaining, after supplying the five hundred families which he was to settle there under the terms of his contract, "for the value of one million of dollars, which," says he, "corresponds to ten reals of silver the arpent; a price very moderate in comparison with that which these lands will immediately have when the introduction of these two thousand families is once accomplished; and it may be calculated, without exaggeration, at three dollars an arpent, which would leave a profit to Bastrop of 1,400,000 dollars."

Is not this sufficient to establish what meaning it had in the opinion of those whom we must suppose to have been best versed in the usages, customs, and laws prevailing with respect to such matters? I am sure it is; and I might here part with this branch of the case, were it not that I can strengthen it still more by referring to a certain historical document to be found among the papers compiled by Mr. White in his Recopilacion.

Morales (the Intendant of Louisiana), in a long communication to Don Pedro Varela y Ulloa, bearing date New Orleans, October 16, 1797. complains that the royal Hacienda, the public treasury, is overburdened by the contracts which are entered into by private individuals, in order to obtain grants of

lands and lots; and he sets forth "that the royal Hacienda may be spared many expenses and losses which may otherwise result from the combination and execution of projects for obtaining grants of lands and lots; that it is clear that the person who is principally responsible for the royal treasury's interests would be more careful in that which may occasion expenses to the treasury, than one who views the affairs of the Hacienda merely as accessory." 2 White's Recop. 425, 426. And in proof of the abuses he complains of, he adverts to the very case under consideration. "As an instance," says he, "of what I have stated, observe the contract between Baron de Carondelet and Baron de Bastrop for the settlement of five hundred families, in the 144 leagues of plain ground granted by the governor," &c., &c. In fine, he asks that the power of granting lands be transferred from the governor to the Intendant.

His remonstrances were listened to; and on the 22d of October, 1798, the governor was notified "that the king had resolved, &c., that the exclusive faculty of granting lands of every kind should be restored to the Intendancy of the Province, &c.; consequently, the power hitherto residing in the governor to these effects was abolished and suppressed, being transferred to the Intendant for the future." 2 White's Recopilacion, 477.

And thus we cannot lay our hands upon a single public document connected with that epoch, and having reference to those transactions, which does not proclaim the fact that these contracts were considered as actual grants, transferring the lands therein designated to the contractor, appropriating them to him, making them his property.

Nor did the governors, in making such contracts, transcend their authority. We have just seen that, until 1798, it resided fully in them. But was the exercise of that authority a violation of the general laws regulating these matters in the Indies? I am ready to show that it was not.

An ordinance of Philip II., embodied in the Leyes de las Indias, had provided that "*haviendo quien quiera obligarse a hacer nueva poblacion, &c., de mas o menos de treinta vecinos, con que no sean menos de diez, se le conceda el termino y territorio,*" &c. Lib. 4, tit. 5, ley 7.

"Should any one contract the obligation of making a settlement of more or less than thirty families, but of no less than ten, let him be granted a district of territory on the same terms and conditions."

And, by referring to the law immediately preceding, it will be perceived that the district of land to be allowed the *poblador*

the undertaker of the settlement, was four leagues square. "*Y, si cumpliere su obligacion, se le den quatro leguas de termino y territorio.*" Ibid., Ley 6.

Whosoever was to receive the establishment was to give those who should register themselves as settlers, lots for building houses, pasture and arable lands, in quantities to suit their demands, &c., provided the whole he should give did not exceed five *peonias* or three *caballerias*.

"*El que tomare el assiento, le hara tan bien con cada uno de los particulares que se registraran para poblar, y se obligara a dar en el pueblo designado, solares para edificar, tierras de pasto y labor en tanta quantidad, &c., &c., con que no exceda ni de a cada uno mas de cinco peonias, ni mas de tres caballerias.*" Ibid., Ley 9.

And the authority under which such contracts as that of Bastrop were entered into was derived from the power originally conferred on the viceroys (afterwards extended to governors, intendants, &c.), by an ordinance of Philip II. of May 18th, 1752, providing: "*Si en, lo yá descubierto de las Indias, huviere algunos sitios y comarcas tan buenos que convenga fundar poblaciones, y algunas personas se applicaren a hacer assiento, y vecindad en ellas, para que con mas voluntad y utilidad lo pueden hacer, los virreyes y presidentes les den en nuestro nombre tierras, solares y aguas,*" &c. Ibid., tit. 12, ley 3.

"If in those parts of the Indies already discovered, there should be sites and districts so good that it may be proper to found settlements, and persons should apply to form a settlement and colony there, in order that they may do so with more alacrity and usefulness, let the viceroys and presidents give them, in our name, lots, lands, and waters," &c.

I have, I think, satisfied the court on this point, and now dismiss it entirely. But should I have failed in carrying your honors' convictions, I would still plead, in the last resort, that I have made out a case that claims at their hands all those considerations of equity which the law of 1824 enables them to allow in cases of an inchoate and incomplete title.

It will not be contested, I am sure, that, as far as the obligations of De Bastrop went, he faithfully complied with them. Indeed, so rapidly was he proceeding to their execution, that he had to be stopped from their further performance by an order of the governor, issued upon a request of the Intendant, setting forth that, on account of the scarcity of funds in the royal treasury, it was necessary that the introduction of families under De Bastrop's contract should be suspended; and this order, it will be observed, expressly stipulated "that it

should not prejudice De Bastrop's rights." It extended, to two years after the execution of the contract should have been resumed, the time within which it was originally to be completed in its greater part; and the decree goes on affirming that, "on his part (the governor's), he will religiously comply with the obligations he had contracted,—a maxim which has always distinguished the Spanish nation."—"*Queded vmd. persuadido siempre que por mi parte observare religiosamente los empenos que contracte, maxima que constantamente ha distinguido la nation Española.*"

What can these obligations be which the governor, with so much emphasis, asserts he will comply with religiously? The introduction of families being stopped, if De Bastrop's agency was limited to his bringing them into the settlement, what could be those rights which were not to be prejudiced? what those obligations which imposed such duties on the governor as to induce him to pledge the Castilian honor that they would be strictly complied with? Why, the meaning is obvious; he clearly alludes to the grant which was to close and complete the contract; and we find him, in effect, two days afterwards redeeming his pledge and executing it.

Still, I will admit that this execution of the grant unto Bastrop left him, as to the remaining families which he was to settle there, subject to the requisition of the Spanish government, who might order him to introduce them within the time agreed upon in the decree just cited; and this is the only thing that can be construed as imparting an inchoate and incomplete character to his title. But it is this, also, that brings the grant within the jurisdiction of your honors; not at their mercy, but that they may do with it what the Spanish tribunals might have done and would have done themselves, had not the sovereignty of the province within the limits of which it is located been transferred from Spain to the United States.

"*Si, por haver sobrevenido caso fortuito, los pobladores no huvieren acabado de cumplir la poblacion en el termino contenido en el asiento, no hayan perdido, ni perdan lo que huvieren gastado, ni edificado, ni incurran la pena,*" &c. Leyes de las Indias, lib. 4, tit. 7, ley 25.

"If, by reason of some fortuitous event, the colonizers should not have completed the settlement within the time specified in the contract, let them not lose what they may have expended or erected; nor let them incur the penalty," &c.

Spain might undoubtedly have exonerated De Bastrop from his liability to bring the families agreed upon in his contract. That she would have done so, who can doubt, that reads the remonstrance of Morales above referred to, the order that inter-

vened upon it, and ponders the considerations which prompted the one and the other? Could the government of Spain give up its solemn contract, and repudiate it to the injury of Bastrop, when the latter had so faithfully complied with his obligations under it? Had not De Bastrop at least an equitable claim in that contract, against the government, and will that claim be disregarded merely because the sovereignty has changed hands?

I cannot persuade myself that there is a doubt left in the minds of your honors. But lest they should still hesitate as to the interpretation which I have set upon the terms of the grant, and the opinion I entertain of their legal value and import, I shall take leave to attach to these remarks, and to use as my own, the argument which has been furnished me on that question by the three most eminent jurists now living in Spain, commending it as expressing the views of men familiar with the matters in dispute, and fully able to do them justice, and whose character, profound learning, and ability are avouched, not only by the testimonial appended to their names, but by the universal estimation in which they are held as jurisconsults and doctors of the civil law, and as men of the highest honor, rectitude, and integrity.

Mr. Soulé filed as part of his argument the opinion of the Spanish jurisconsults, T. F. Pacheco, Manuel Cortina, and S. de Olozaga, delivered in Madrid, September, 1849.

Mr. Justice CATRON delivered the opinion of the court.

In this case objections were made in the court below, and are again insisted on here, to the proof of authenticity of the title-papers on which the petition is founded; nothing but copies being produced. Our opinion is that the copies were properly admitted in evidence, and that they establish the facts that similar originals existed; and as on the true meaning of these documents our decision proceeds, we deem it proper to set them forth. They are as follows:—

Copy.

SENOR GOVERNOR-GENERAL:—The Baron de Bastrop, desirous of promoting the population and agriculture of Ouachita, and being about to pass into the United States of America to conclude the plan of emigration which he has projected, and to return with his family, represents to your lordship that it is indispensable that, on the part of the government, there should be designated a district of about twelve leagues square, in which may remain included the Bayou Siard and its vicinity, in order that, without the least obstacle or impediment, those families may proceed to settle upon them, which the petitioner

is going to introduce under the express condition that concessions of land are to be *gratis;* and that under no title or pretext can they exceed the quantity of four hundred square arpents at most, with the object of preventing the introduction of negroes and manufactories of indigo, which, in that district, would be absolutely contrary and prejudicial to the culture of wheat, and would cause the petitioner to lose irremediably the profits of his establishment.

He also petitions your lordship to be pleased to grant him permission to export, for the Havana, the flour which may be manufactured in the mills of Ouachita, without restricting him to sell it absolutely in New Orleans and posts of this province, unless it should be necessary for its subsistence, as in that case it should always have the preference.

It becomes also indispensable that the government should charge itself with the conducting and support of the families which the petitioner shall have introduced, from the post of New Madrid to that of Ouachita, by supplying them with some provisions for the subsistence of the first months, and facilitating to them the first sowing of the necessary seed; granting to the inhabitants who are not Catholics the liberty of conscience enjoyed by those of Baton Rouge, Natchez, and other districts of the province, and the government being pleased finally to fix the number of families which the petitioner is to introduce.

Zeal for the prosperity and encouragement of the province, united to the desire of procuring the tranquillity and quiet of this establishment by removing at once whatever obstacles might be opposed to these interesting objects, induce me to represent to your lordship what I have set forth, hoping that your lordship will recognize in these dispositions the better service of the king, and advancement of the province confided to your authority. DE BASTROP.

New Orleans, 20th June, 1796.

"*New Orleans, June* 21, 1796.

Seeing the advantages which will result from the establishment projected by Baron Bastrop, the commandant of Ouachita, Don Juan Filhiol will designate twelve leagues square, half on the side of the Bayou of Siar, and half on the side opposite the Ouachita, for the purpose of placing there the families which the said Baron may direct, it being understood that no greater concession of land is to be given to any one than four hundred square arpents, at most, *gratis*, and free from all dues. With regard to the object of this establishment, it is for the cultivation of wheat alone. The exportation of the prod-

ucts of this province being free, the petitioner need not doubt that it will be allowed to him for the flour which he may manufacture at the mills of the Ouachita, to the Havana and other places open to the free commerce of this province. The government will charge itself with the conducting of the families from New Madrid to Ouachita, and will give them such provisions as may appear sufficient for their support during six months, and proportionably for their seeds. They shall not be molested in matters of religion, but the Apostolical Roman Catholic worship shall alone be publicly permitted. The petitioner shall be allowed to bring in as many as five hundred families; provided that, after the lapse of three years, if the major part of the establishment shall not have been made good, the twelve leagues square destined for those whom the petitioner may place there shall be occupied by the families which may first present themselves for that purpose.

THE BARON DE CARONDELET.

Registered. ANDRES LOPEZ ARMESTO.

Official.

Whereas, on the part of the Senor Intendente, by reason of the scarcity of funds, the suspension of further remittance of families has been solicited until the decision of his Majesty, there should be no prejudice occasioned to you by the last paragraph of my decree, which expresses that if, at the end of three years, the greater part of the establishment shall not have been found made good, the families which may present themselves shall be located within the twelve leagues destined for the establishment which you have commenced, and it shall only take effect two years after the course of the contract shall have again commenced, and the determination of his Majesty shall have been made known to you.

"You will always remain persuaded that, on my part, I will religiously observe the engagements which I shall have contracted; a maxim which has constantly distinguished the Spanish nation. God preserve you many years.

New Orleans, 18th June, 1797.

BARON DE CARONDELET.

THE SENOR BARON DE BASTROP.

Concession.

The Baron de Carondelet, Knight of the Religion of St. John, Field-Marshal of the Royal Armies, Governor-General, Vice-Patron of the Provinces of Louisiana, West Florida, Inspector of their Troops, &c.

Whereas the Baron de Bastrop, in consequence of the pe-

tition, under date of the 20th of June of the year last past, and decree of the 21st of the same, has commenced the establishment of Ouachita, which thereby he stipulated with the government, in order to avoid all obstacle, difficulty, and embarrassment hereafter, and that with all facility the families may be located, which, to the number of five hundred, the said Baron is successively and proportionally to introduce or cause to be introduced, we have determined to designate the twelve leagues destined for said establishment in the terms, with limits, land-marks, and boundaries, and in the place which is designated, fixed, and marked out by the figurative plan and description, which go as a caption of this title, which are made out by the Surveyor-General, Don Carlos Trudeau, it having appeared to us to be thus most expedient to avoid all contestation and dispute, and approving them, as we do approve them, exercising the authority which the king has granted us, we destine and appropriate, in his royal name, the aforesaid twelve leagues, in order that the said Baron de Bastrop may establish them in the terms, and under the conditions, which are expressed in the said petition and decree. We give the present, signed with our hand, sealed with the seal of our arms, and countersigned by the undersigned, honorary commissary of war, and secretary for his Majesty of this commandancy-general of New Orleans, on the 20th of June, 1797.

THE BARON DE CARONDELET.

ANDRES LOPEZ DE ARMESTO.

[*For map see original.*]

I, Don Carlos Trudeau, Surveyor Royal and Particular of the Province of Louisiana, &c., do certify that the present draft contains one hundred and forty-four superficial leagues, each league forming a square, the sides of which are in length two thousand and five hundred toises [a toise is six French feet long], measure of the city of Paris, according to the custom and practice of this colony, the said land being situated in the post of Ouachita, about eighty leagues above the mouth of that river, falling into Red River, adjoining on the part of the southwest to the eastern shore of the river and bayous Ouachita, Barthelemi, and Siard, conformably to the red line which borders the said river and bayous, bounded on the south part by a line drawn from the south seventy-five degrees east, about three leagues and one mile long, beginning from the shore C of the Bayou Siard, and continuing as far as the height of the junction A of the said Bayou Siard with the Bayou Barthelemi; the said point A being as a basis on the line of measurement A B, of twelve leagues in length, parallel with the plan

of Bayou Barthelemi from the point A to the end of the said twelve leagues, which terminate at the point B, where is the mouth of the rivulet named Bayou Termiro; the lines D E, F G, are parallel lines, directed north fifty-two degrees east, without minding the variation of the compass, which varies eight degrees to the northeast.

In testimony I deliver the present certificate, with the draft hereto affixed, for the use of the Baron de Bastrop, on the 14th day of June, 1797, I, the surveyor, having signed the same, and recorded in the book A, No. 1, folio 38, draft No. 922, of the surveys.

I do certify the present copies to be conformable to the originals which are lodged in the office under my care, to which I refer; and, at the request of a party, I deliver the present, same date as above.

CARLOS TRUDEAU, *Surveyor.*

TO THE GOVERNOR-GENERAL: — Baron de Bastrop has the honor to make known to you that, it being his intention to establish in the Ouachita, it is expedient that you should grant to him a corresponding permission to erect there one or more mills, as the population may require; as also to shut up the Bayou de Siar, where he proposes to establish the said mills, with a dike in the place most convenient for his works; and, as it appears necessary to prevent disputes in the progress of the affair, he begs also the grant along the Bayou Barthelemi, from its source to its mouth, of six toises on each bank, to construct upon them the mills and works which he may find necessary, and prohibiting every person from making upon said bayou any bridge, in order that its navigation may never be interrupted, as it ought at all times to remain free and unobstructed. This request, Sir, will not appear exorbitant, when you are pleased to observe that your petitioner, who will expend in these works twenty thousand dollars or more, will be exposed without these grants to lose all the fruits of his labors by the caprice or jealousy of any individual, who, being established on this bayou, may cut off the water or obstruct the navigation; not to mention the loss which the province will sustain of the immense advantages to result from the useful project proposed for the encouragement of the agriculture and population of those parts. DE BASTROP.

New Orleans, June 12, 1797.

New Orleans, June 12, 1797.

Considering the advantages to the population on the Ouachita, and the province in general, to result from the encour-

agement of the cultivation of wheat, and the construction of flour-mills, which the petitioner proposes to make at his own expense, I grant him, in the name of his Majesty, and by virtue of the authorities which he has conferred upon me, liberty to shut the Bayou de Siar, on which he is about to establish his mills, with a dike at the place most proper for the carrying on of his works. I also grant him the exclusive enjoyment of six toises of ground on each side of the Bayou Barthelemi, from its source to its month, to enable him to construct the works and dams necessary for his mills; it being understood that by this grant it is not intended to prohibit the free navigation of the said bayou to the rest of the inhabitants, who shall be free to use the same, without, however, being permitted to throw across it any bridge, or to obstruct the navigation, which shall at all times remain free and open. Under the conditions here expressed, such mills as he may think proper to erect may be disposed of by the petitioner, together with the lands adjoining, as estates belonging entirely to him, in virtue of this decree, in relation to which the surveys are to be continued, and the commandant, Don Juan Filhiol, will verify and remit them to me, so that the person interested may obtain a corresponding title in form; it being a formal and express condition of this grant, that at least one mill shall be constructed within two years, otherwise it is to remain null.

THE BARON DE CARONDELET.

Registered. ANDRES LOPEZ ARMESTO.

To his Excellency the Senor Baron de Carondelet, Governor-General of the Province of Louisiana, &c.

Don Philip de Bastrop has the honor to observe to your lordship, that the twelve leagues square which your lordship has granted to him by his contract are found in part overflowed and occupied by ancient inhabitants, in consequence of which he prays that your lordship will be pleased to grant him the same quantity of land, to be taken upon the River Ouachita and the Bayous de Siard and Barthelemi, where it will be most convenient to him, without prejudice to the lands which your lordship has granted to the Senor de Maison-Rouge, in the Prairie Chatellerian; a favor which he hopes to receive from the upright justice which your lordship administers.

P. DE BASTROP.

New Orleans, 10*th June*, 1797.

Order.

New Orleans, 10*th June*, 1797. As he requests, let it be despatched by the secretary department, in the form which e solicits. THE BARON DE CARONDELET.

Translation.

June 21, 1796.

To the Senor Baron de Bastrop:— With attention to the advantages which must result to the population of the Ouachita, and that of the province in general, from the encouragement of the cultivation of wheat and construction of flour-mills which the petitioner intends to make at his expense, I grant him, in the name of his Majesty, and using the powers which he has conceded to me, that he may close the Bayou de Siar, where he may establish the mills with a dike at the place most suited to his works. I likewise grant him the exclusive enjoyment of six toises of land on each side of the Bayou Siar, from its source to its mouth, in order that he may construct the works and embankments necessary to his mills; it being well understood that in this grant it is not understood to prohibit the free navigation of said bayou to the other inhabitants who may make use of it; without, nevertheless, it being permitted to them to cast any bridge nor embarrass the navigation, which at all times is to remain free and unimpeded. Under the conditions expressed, when the mills have been constructed which he may see fit, he may dispose of them and of his adjacent lands as property belonging to him entirely, in virtue of this decree, by which the proceedings of survey, which the commandant, Don Juan Filhiol, shall make out and remit, shall be extended in consequence, in order to provide the party concerned with the corresponding title in form. It being a formal and express condition of this grant, that at least one mill be found constructed within two years, since otherwise it shall remain annulled.

The Baron de Bastrop contracts with his Majesty to furnish, for the term of six months, rations to the families which he has latterly introduced at the post of the Ouachita, which are to be composed of twenty-four ounces of fresh bread, or an equivalent in flour; twelve ounces of fresh beef, or six of bacon; two ounces of fine *manestra*, or three of ordinary, and one thousandth part of a *celemin* (about a peck) of salt; for which there is to he paid to him, by the royal chests, at the rate of a real and a half for each ration; for which purpose there shall be made out, monthly, a particular account, the truth and regularity of which shall be attested, at foot, by the commandant of that post. Under which conditions, I oblige myself, with my person and estate, to the fulfilment of the present contract, subjecting myself, in all things, to the jurisdiction of this General Intendancy.

In testimony of which, I sign it at New Orleans, the 16th of June, 1797. Baron de Bastrop.

New Orleans, date as above.

I approve this contract, in the name of his Majesty, with the intervention of Senor Gilbert Leonard, principal contractor of the army in these provinces, for its validity. Two certified copies are to be directed to the Secretary, Juan Ventura Morales. With my intervention, Gilbert Leonard. Copy of the original, which remains in my keeping, and which I certify, and is taken out, to be passed to the Secretary of this General Intendancy.

New Orleans, ut supra.

GILBERT LEONARD.

Whereas the Intendant, from the want of funds, has solicited the suspension of the last remittance of families, until the decision of his Majesty, there ought to be no prejudice occasioned to you by the last paragraph of my decree, which expresses that, if within three years the major part of the establishment shall not have been made good, such families as may first present themselves shall be located within the twelve leagues destined for the settlement which you have commenced; and this shall only have effect two years after the course of the contract shall have again commenced to be executed, and the determination of his Majesty shall have been made known to you. You will always remain persuaded that, on my part, I will observe, religiously, the engagements I have contracted; a principle which has constantly distinguished the Spanish nation. God preserve you many years.

New Orleans, June 18, 1797.

THE BARON DE CARONDELET.

BARON DE BASTROP.

Complainants exhibit all these title-papers, and pray that the validity of their claim may be inquired into and decided. On part of the United States, a brief denial of all the facts alleged was made; and on this issue the District Court adjudged that the grant to the Baron de Bastrop was a valid and lawful grant, by legal title in form; and further adjudged that complainants be declared the true and lawful owners, and entitled to recover from the United States, and be for ever quieted and confirmed as against the United States in the ownership and possession of the land claimed by them.

And here a difficulty arises, whether the District Court had jurisdiction, as on its own assumption, that this was a perfect Spanish grant, no power existed under the act of 1824 to pass judgment on such title. So we held at our last term, in the case of the United States *v.* Reynes, 9 Howard, 127.

But in all cases of titles not perfect, and which by decree may be made so, founded on the equity of such claim, jurisdiction does exist; and Bastrop's contract with the Spanish government, not being a perfect title in our judgment, either in form or substance, its character and validity can be inquired into, and adjudged, under the act of Congress. And that it was of this imperfect character, complainants themselves formerly assumed; they having submitted their title to a board of commissioners instituted to examine and report to Congress on imperfect grants, and which board reported unfavorably of the Bastrop claim.

It has also on several occasions been presented to Congress, and a perfect title required, on the assumption that there was none.

It is true, that no equity is set up in the petition, the title-papers being relied on, and nothing more; nor is there any evidence found in the record, tending to prove that Baron Bastrop expended any thing whatever by bringing in families. They were obviously settled on the land at government expense. Only between twenty and thirty families were settled, as is proved by Stuart and Filhiól, who name the heads of each family, and who are complainants' witnesses. The settlers have received titles from the Spanish provincial government, or from the United States government, under which they now stand protected. They manifestly never claimed under Bastrop, nor sought to acquire titles under him. This disposes of the preliminary questions.

And we now come to an examination of the title set forth and relied on in the petition. The final power concluding Governor Carondelet's decrees bears date June 20, 1797. For a proper understanding of this decree it must be taken in connection with previous documents to which it refers, including the proces verbal and plan, delivered to Baron Bastrop, June 14, 1797, by Trudeau, the Surveyor-General. June 20, 1796, Bastrop represented to the governor, that, to conclude his plan of emigration to Ouachita, which he had projected, there should be designated a district of about twelve leagues square, in order that, without the least obstacle or impediment, the families he might introduce could proceed to settle on the land.

June 21, 1796, the governor assented to this request, and ordered Filhiol, the commandant at Ouachita, to designate the land, "for the purpose of proceeding to locate upon them the families which the aforesaid Baron may direct."

The land was designated by a plan; and on it, and on the previous agreement, the final decree of June 20, 1797, proceeds. It is insisted that this is a decree of a perfect title, (or

fee simple in our law language,) vesting the twelve leagues square in absolute property in the Baron de Bastrop, subject to descent and alienation; and as a settlement of this question will end the controversy, we do not propose to examine any other. This document recites, that the Baron had commenced the establishment, according to his petition and the governor's decree therein, of the previous year; and in order to avoid all obstacles, difficulty, and embarrassment thereafter, and that with all facility the families might be located to the number of five hundred, as the Baron was bound to do; "we have," says the governor, "determined to designate the twelve leagues destined for said establishment." That is to say, according to the plan of survey above referred to, and which is attached to the decree. And then came the effective words of grant relied on: "We destine and appropriate in his royal name [the king's] the aforesaid twelve leagues, in order that the said Baron de Bastrop may 'establish' them, in the terms, and under the conditions, which are expressed in the said petition and decree." Having had a translation made of the Spanish grant, we find that the word "establish," next above, should be "settle."

A territory of twelve leagues on all sides, amounting to one million of arpents, was "destined and appropriated," in order that the Baron "might settle the land," and establish his colony, without difficulty or embarrassment in exclusion of others making similar establishments under public authority; and also in exclusion of private persons, not introduced by the Baron. For this purpose, the land was destined and appropriated. As colonizer, the Baron had a monopoly, within the district, to introduce settlers. His object was monopoly throughout. He was a Hollander, and proposed to introduce farmers from his own country, as appears by Governor Carondelet's letter to Filhiol, commandant at Ouachita, read by complainants. To each emigrant family a tract of four hundred arpents was to be granted *gratis;* the farmers were to be engaged in raising wheat, and restricted to this crop as an article produced for the market. To prevent other crops, such as indigo, from being grown, the farms were to be small; and in aid of this policy, slave labor was intended to be excluded.

As five hundred wheat-growing farms were to be established under the supervision of the Baron, it is manifest that a large section of country was deemed necessary, because the greater portion of southern flat and wet lands were unfit for the purpose of raising wheat.

Another circumstance is manifest. The agitations of his own country, growing out of the French revolutionary wars,

were such as to induce the Baron to believe, no doubt, that families might be had, to almost any number, whose farms had been devastated at home by the events of war, or who desired to seek shelter from harassment in Louisiana. And in this conclusion the Spanish government obviously concurred; and was furthermore of opinion, that great advantage would result to the province from such an establishment as was proposed by the Baron; and therefore he was most liberally dealt by. From New Madrid, on the River Mississippi, through the country, to the lands designated, the government bound itself to transport the emigrant families and their baggage, to the number of five hundred; to furnish them with support for six months, and with seed for the first year.

Thus, provision was made for a colony at public expense. The Baron's design was the production of large quantities of wheat. This was a primary step contemplated. But the leading object of profit, on part of the Baron, was the manufacture of flour; and that he should be the exclusive monopolist in grinding the wheat. To secure this monopoly, he applied to the governor for a grant in property of the Bayou de Siar, and also the Bayou Barthelemi, and six toises of land on each side of said bayous, from their sources to their mouths, for the purpose of enabling him to erect his mills on them, and of making the necessary dams and dikes: in doing which he alleged that he would have to expend twenty thousand dollars, or more. The grant was made, as solicited, for both the bayous. It declares that "such mills as he (the Baron) may think proper to erect, may be disposed of by him, together with the lands adjoining, as estates belonging entirely to him." And the commandant, Filhiol, was ordered to survey the bayous and lands granted on each side thereof, and remit the surveys to the governor, so that the Baron might obtain a corresponding title in form. The Bayou de Siar bounds one side of the survey of twelve leagues, and the Bayou Barthelemi meanders through its depth, for twenty or thirty miles.

The Baron also stipulated by his contract that he might be permitted to transport his flour to Havana, and other places open to the free commerce of the province, without hinderance or charge.

Taken in all parts, such was this contract and its objects. And as the motives of the parties enter decidedly into its construction, we have stated them in advance. The manifest design of the Baron was to become a large manufacturer of flour; to control the inhabitants and monopolize the wheat, throughout the territory designated for the colony. He did not propose to cultivate the soil himself, nor did he require

land for this purpose; his grant in full property of the water-power necessary for grinding was all the property he required. Over other lands within the twelve leagues he sought control, but asked for no title to property in them. His first request to the Spanish government was in plain accordance with these views of the transaction; he solicited "that a district be designated about twelve leagues square, in which he may place the families he is about to bring in": and the request was granted, in the terms and for the purposes expressed by the petition. To hold that the language employed by the petition, and reiterated by the governor in reply, amounted to a title in property, would be a forced and unnatural construction, contrary to the objects proposed to be accomplished, and in violation of the known policy of the Spanish government; which was, to encourage population and agriculture, but to discourage speculation, by refusing to grant large districts of arable lands to single individuals.

If the decree of June 20, 1797, was intended to confer a title in full property, and the terms "destine and appropriate" meant to convey the same title, that was plainly given to the two bayous, what occasion could exist for such a careful proceeding to obtain these bayous in full property? The Bayou Barthelemi lies within the grant, and the assumption is extravagant that it was twice granted; once June 12, and again June 20, 1797.

Another consideration shows the manifest inconsistency of assuming that both grants were in full property. The grant of the bayous was on the express condition that at least one mill should be constructed within two years from that date, otherwise the grant should remain null. How could it stand annulled on failure to perform a subsequent condition, if the larger grant was also in full property, and included the bayous? In such case, the forfeiture would not result to the crown, but to Bastrop himself; being saved by the larger grant, including the bayous. And then, the twelve league grant having no condition in it, that of the bayous amounted to nothing, was idle, and useless.

In the next place, if the Baron had a perfect grant, the families brought in could only take titles from him as owner; the government having nothing left to grant. And yet these immigrant settlers applied to the Spanish government for titles, which were granted, and that at a time when the meaning of the contract could hardly be misunderstood; being only a couple of years after it was concluded.

An instance is found in the record, and was given in evidence below. April 1, 1799, Michael Rogers, a settler placed

on the land by Bastrop, applied for a title, and during that year a perfect title was decreed by the Intendant Morales, according to the petition of Rogers.

Again, if the Baron could not by a conveyance make title to settlers, on what plausible pretence can it be assumed that he could convey in full property the whole twelve leagues to Morehouse and others?

Furthermore, if Morehouse took the full legal title by his deed, on what ground can it be assumed that our government could defeat such fee-simple title in Morehouse, and his alienees, by making grants in fee to individual settlers, either coming in under Baron Bastrop or otherwise? And yet this has been uniformly done. For forty years and more, the claimants under this grant have stood by, announcing that they were fee-simple owners, and in possession of a perfect legal title, without an attempt to try the strength of their claim by suit. The manifest truth is, that the validity of this claim has been disavowed by the Spanish and American governments, and that the claimants had no confidence in it themselves; certainly not enough to risk a trial of it in a court of justice, as they might at all times have done, by petitory actions against obtruders. These references, however, to particular transactions and facts, whether found within or outside of the title-papers, are of little consequence, compared with the prominent and conclusive consideration, that a complete Spanish grant uniformly (so far as our knowledge extends), plainly, and in language the most direct and unequivocal, gave to the grantee the whole ownership to the land granted, for him and his successors; with power to sell the same at his will. An instance of such grant is given in 8 Howard, 314, attached to the case of Menard's Heirs *v.* Massey.

We repeat, that no language is employed in any part of the contract with the Baron de Bastrop, importing a grant in property. No expression is used by the Spanish governor conveying such intention. It is plainly a contract that a large district should be designated on lands belonging to the public domain, where the Baron might exercise certain exclusive privileges. In its nature and extent of grant this contract is identical with that made on the same day (June 20, 1797) with the Marquis de Maison-Rouge, appropriating a district of country adjoining to that set apart for the Baron de Bastrop, on which the Marquis agreed to establish settlers, and which lands were claimed under his will, on an assumption that the grant was complete and conferred absolute ownership. The principles governing the two contracts are the same. The claim set up under the Marquis de Maison-Rouge was adjudged not to have given

any title, in the case of United States *v.* King, first reported in 3 Howard, 773; but which was finally decided in 1849, and stands reported in 7 Howard, 833. We deem the principles there adjudged as governing the case before us; and to the opinion of the court then delivered by the chief justice, and found in 7 Howard's Reports, we refer for a more full discussion on this description of claim. Nor would we again have considered the question involved, had there not been various circumstances connected with the cause now before us, and expressions used in the agreement made by the Spanish authorities with the Baron de Bastrop, that are supposed to be of a character to distinguish the cases, and were urged in argument as having done so; but which are found on examination to be immaterial.

On the whole, we are of opinion that the decree of the District Court should be reversed, and the petition dismissed; and so order.

The causes of United States against Louise Livingston and others, and United States against Thomas Callender's widow and heirs and others, claiming under Bastrop, are identical with the cause above decided; and for the reasons here assigned, it is ordered that both the decrees in these causes be reversed, and that the petitions be dismissed.

Mr. Justice McLEAN, Mr. Justice WAYNE, Mr. Justice McKINLEY, and Mr. Justice GRIER dissented.

Mr. Justice McLEAN.

I had hoped that the attitude in which this case was presented would have led to a different result from that which has just been pronounced. It appeared to me that there were grounds for such an expectation. The case is in chancery. It presents the broad basis of equity, and in this view, I supposed, could not be considered as having been ruled by the decision in the case of the United States *v.* King. That was a petitory action under the Louisiana practice, in the nature of an action of ejectment. In their opinion the court say: "If these defendants had possessed an equitable title against the United States, as contradistinguished from a legal one, it would have been no defence to this action. But no such title is set up, nor any evidence of it offered. The defendants claim under what they insist is a legal title, derived by the Marquis de Maison-Rouge from the Spanish authorities." And in the conclusion of their opinion, the court say: "For the reasons herein before stated, that this instrument of writing relied on by the defendants did not convey, or intend to convey, the land in question to the

Marquis de Maison-Rouge, the judgment of the Circuit Court must be reversed, and the cause remanded," &c.

Now if the instrument did not convey the land by a complete title to the Marquis, it by no means necessarily followed that, under the usages of the Spanish government, an equity was not transferred by it. It is admitted that all instruments of writing, whether purporting to be grants or contracts, must be construed by the court. But if the instrument has been executed under foreign laws, and especially if it relate to the realty, parol evidence is heard both in regard to its form and effect. This principle is as old as the law itself; and it arises from that natural sense of justice which pervades all systems of jurisprudence. And if on such an investigation it should appear, that an interest less than a complete title was conveyed, the interest would be protected under the treaty of 1803, and the acts of Congress.

By the act of the 26th of May, 1824, made applicable to this case by the act of the 17th of June, 1844, claims are provided for "which might have been perfected into a complete title, under and in conformity to the laws, usages, and customs of the government under which the same originated, had not the sovereignty of the country been transferred to the United States." And the proceeding in the court is to "be conducted according to the rules of a court of equity." And the decree in regard to the title is to be "according to the law of nations, the stipulations of any treaty, and proceedings under the same, the several acts of Congress in relation thereto, and the laws and ordinances of the government from which it is alleged to have been derived." The treaty of cession stipulated that the property of the citizens should be protected. And if the claim now before us, under the Spanish law, could be denominated property, this court have jurisdiction, and the right should be maintained. On a mature examination of this whole case, I am brought to the conclusion that, under the Spanish government, the right now asserted would have been enjoyed by the Baron de Bastrop, his heirs and assignees.

He brought over from Europe, and settled on this grant, at least one hundred and eleven families, at an expense, probably, of from thirty to fifty thousand dollars. His labors and responsibilities were very great in carrying out his engagement with the government, and he would have completed it, without doubt, had not the importation of families been suspended, at the instance of the government, on account of the scarcity of funds. The enterprise was deemed of the highest importance by the Governor-General. In a letter to Filhiol, the commandant at Ouachita, dated New Orleans, 2d April, 1795,

Carondelet says: "Your hopes are about to be satisfied." "We have just passed a contract with the Marquis of Maison-Rouge for thirty families of agriculturists," &c. "On the other hand, the Baron de Bastrop, a Hollander, has contracted also for a quantity of families who will come to us direct from Holland," &c. And he remarks: "According to this plan you see, Sir, that you will no longer be so isolated as heretofore, and that in a short time you will find yourself in a condition to make head against the savages," &c.

How favorably would such a consideration contrast with those on which immense tracts of land were granted, by the Spanish government, in East and West Florida, and which have been confirmed by this court. The construction of a saw-mill, the formation of a cow-pen, or other service, real or supposed, rendered to the public, was deemed sufficient to authorize a large grant of territory. This was the policy of that government, and, under the faith of the treaty and the acts of Congress referred to, it was sanctioned by this court.

For more than fifty years have the families brought from Europe by the Baron de Bastrop been in possession of this land. They occupied and improved it as their own, and, in the course of nature, their children and descendants may now be supposed to possess it. The right of each family was limited in the grant to four hundred arpents. This claim, being located and designated by boundaries, entitled each family to a particular tract, and some evidence of title was necessary, whether from the Baron de Bastrop, or, by his designation and consent, from the governor, would seem to be unimportant. In fact, it could have been only a mere allotment among the families in pursuance of the grant. Of this character was the allotment to Michael Rogers; it was a recognition of the grant to Bastrop.

The correctness of this statement is shown from a letter of Filhiol, dated 12th September, 1796, to the Marquis de Maison-Rouge, which says, referring to a letter from the Governor-General: — "His Excellency adds: I charge you also, Sir, in the absence of M. de Grand Pre, to oblige M. de Maison-Rouge to make choice of the four thousand arpents of land which are to be distributed to the thirty families which he is to establish."

It appears from the evidence, that about twenty-one thousand dollars have been paid in taxes upon about three sevenths of this grant, and it is supposed that a larger sum has been paid on the other four sevenths.

What was the nature of the title given to the Baron de Bastrop?

In his petition to the Governor-General, dated the 20th of

June, 1795, he asks that there should be designated a district of about twelve leagues square," &c., "in order that, without the least obstacle or impediment, those families may proceed to settle upon them which he is going to introduce under the express condition that concessions of land are to be *gratis;* and that under no title or pretext can they exceed the quantity of four hundred arpents at most."

The decree of the governor the following day was: "Considering the advantages which must result from the establishment," &c., "the commandant of Ouachita, Don Juan Filhiol, will designate twelve leagues square, half on the side of the Bayou de Siar, and half on the side opposite Ouachita, for the purpose of proceeding to locate upon them the families which the aforesaid Baron may direct; it being well understood that to none shall there be given a greater concession of land than that of four hundred square arpents at most, *gratis* and free from all dues, inasmuch as the object of this establishment is to be only for the cultivation of wheat," &c. And the government is asked "to fix the number of families which the petitioner is to introduce." In the decree which followed, it is said: "The petitioner may introduce to the number of five hundred families." And the government undertook to pay the expense of conveying the families from New Madrid to Ouachita, and furnish them with provisions for six months, "Provided that, if, after the lapse of three years, the greater part of the establishment shall not have been made good, the twelve leagues square destined for the families which the Senor petitioner will send shall be occupied by the first families that may present themselves."

The expenses to the government under this decree being greater than its limited means would warrant, the Baron de Carondelet, on the 19th of June, 1797, gave an official paper to the Baron de Bastrop, stating, "whereas, on the part of the Senor Intendente, by reason of the scarcity of funds, the suspension of further remittance of families has been solicited until the decision of his Majesty, there should be no prejudice to you by the last paragraph of my decree, which expresses that, if, at the end of three years, the greater part of the establishment shall not have been found made good, the families which may present themselves shall be located within the twelve leagues destined for the establishment which you have commenced, and it shall only take effect two years after the course of the contract shall have again commenced, and the determination of his Majesty shall have been made known to you."

And on the 20th of June, in the same vear, the Baron de Carondelet issued a concession, stating, "Whereas the Baron

de Bastrop, in consequence of the petition, under date of the 20th of June of the year last past, and decree of the 21st of the same, has commenced the establishment of the Ouachita, which thereby he stipulated with the government, in order to avoid all obstacle, difficulty, and embarrassment hereafter, and that with all facility the families may be located, which, to the number of five hundred, the said Baron is successively and proportionally to introduce, or cause to be introduced, we have determined to designate the twelve leagues destined for said establishment in the terms, with limits, landmarks, and boundaries, and in the place which is designated, fixed, and marked out by the figurative plan and description, which go as a caption of this title, which are made out by the Surveyor-General, Don Carlos Trudeau, it having appeared to us to be thus most expedient to avoid all contestation and dispute, and approving them, as we do approve them, exercising the authority which the king has granted us, we destine and appropriate, in his royal name, the aforesaid twelve leagues, in order that the said Baron de Bastrop may establish them in the terms, and under the conditions, which are expressed in the said petition and decree." The boundaries of this grant are made certain by its calls, the figurative plan of Don Carlos Trudeau, the Surveyor-General, and an actual survey executed by McLaughlan.

Does this grant convey any title to the Baron de Bastrop, and if it does, to what extent?

The consideration which induced the grant was, the establishment of five hundred families within its limits. As each family was restricted to four hundred arpents, the five hundred would occupy only two hundred thousand acres, leaving eight hundred thousand within the grant unappropriated. In the first grant, if the greater part of the establishment should not be made good within three years, the first families that shall present themselves were to be received, as a part of the five hundred which were to be introduced by Bastrop. And as the pecuniary aid of the government was withheld, the above condition was suspended until the lapse of two years after the will of the sovereign should be made known.

Governor Bouligny, a contemporary, speaking of this grant, says: "Let us make the calculation upon a million of arpents, in round numbers. Bastrop has obliged himself to introduce and locate in this tract five hundred families of cultivators, giving them to each family a piece of land ten arpents front upon the Ouachita or Bayou Siar by forty arpents depth, which will make a superficies of four hundred arpents for each family, so that the five hundred families will occupy a surface of two

hundred thousand arpents. So that there will be to him, in absolute property and lordship, eight hundred thousand arpents."

To suppose that the Baron de Bastrop would engage in such an enterprise, involving an immense expenditure of money, in addition to the great labor and responsibility of superintending the importation from Europe of five hundred families, would be unreasonable, and against the established usages of the government. The service was one of the greatest importance to the country, and it was favored by the sovereignty itself.

This is shown by the express sanction by the king of the contract made by the Baron de Carondelet with the Marquis de Maison-Rouge, to bring into the country thirty families, dated 17th March, 1795; and as a consequence of which there were subsequently granted thirty superficial leagues. The transaction with the Baron de Bastrop occurred about the same time.

It is true that Morales, being Intendant *ad interim*, and being under obligations to provide means to meet the expenditures arising out of these and similar grants, remonstrated to the king against the policy of making them. He says, in a letter to Don Pedro Varela y Ulloa, dated October 16th, 1797: "As an instance of what I here state, observe the contract between Baron de Carondelet and Baron de Bastrop, for the settlement of fifteen hundred Protestant families, in the one hundred and forty four square leagues of plain ground, in the district of Ouachita granted by the governor, on condition that the royal Hacienda should pay the expense of transporting those persons from New Madrid to their place of settlement, of maintaining them for the first six months," &c.; and he says it would cost the treasury $ 125,000, and suggests: "It is not probable that, if the Baron de Carondelet had held the obligations of the intendency, he would have rendered it liable for a demand which there was no means to satisfy." In consequence of this remonstrance, by a royal order, dated 22d October, 1798, the right to grant lands was transferred from the Governor-General to the Intendant.

It must be observed, if there be no error in the translation, that Morales was mistaken in stating the number of families, and that they were to be Protestants. In a letter dated the 25th of July, 1799, he particularly complains of the prodigality of Don Manuel Gayoso de Lemos in allotting large quantities of land to persons who could not even cultivate them," &c. But, he says, "to annul these grants would be productive of great difficulties, and this must be considered an evil without a remedy."

There is nothing in this change of policy, which was induced from a want of funds, to affect the rights acquired under the more liberal policy which preceded it.

But, it is said, the grant must be construed by its language, and not by extraneous facts and circumstances. This is correct as a general principle, but when we are called to construe an instrument, unknown to the laws with which we are familiar, and which was formed in a foreign idiom, and in accordance with usages and laws to which we are, in a great degree, strangers, it is wise and it is legal to follow the established construction of such an instrument under such laws.

That the grant in this case separates the land designated from the public domain, is clear to my mind; and if separated, has it not passed from the control of the sovereignty? Beyond the settlement of the five hundred families, the government had no demand on the grantee. This settlement being made, the condition of his grant is performed. And if the government failed, as was the fact, to advance the funds stipulated to be paid by it, and the condition was suspended, its non-performance to the full extent is not imputable to the grantee. He stands upon the grant, having done what the law required him to do. Two hundred thousand arpents of the grant are appropriated to emigrant families; eight hundred thousand remain, not to the government, for the grant has separated the entire tract from the public domain. The grantee is under no obligation, express or implied, to settle more than five hundred families; the remainder of the grant, under any construction sanctioned by law or justice, I think, remains to him.

There are no words in this instrument which convey a fee simple at common law, but by the civil law it gives to the grantee, in my judgment, a complete title. No technical terms are necessary, under the civil law, to constitute such a title. The intent of the parties is ascertained by the language of the entire instrument, and effect is given to it accordingly. This mode of construction commends itself to our reason and judgment more strongly than the technical forms of the common law. Whilst the latter are seldom understood by the uninstructed, the former cannot be misapprehended by an individual of ordinary intelligence.

In this grant words are used of strong and decisive import; words which, it is believed, show the intent of the grantor as fully as any that could have been adopted. "Exercising the authority which the king has granted to us, we destine and appropriate, in his royal name, the aforesaid twelve leagues." *To destine* is "to set, ordain, or appoint to a use, purpose, estate, or place." We are all "destined to a future state." "To fix

unalterably by a divine decree, to appoint unalterably." The word *appropriate*, in the sense used, signifies, "to set apart for or assign to a particular use, in exclusion of all other uses"; "to claim or use by an exclusive right." No words of a more determinate character, to convey a complete title, could have been found in any language. The words "*destinamos y apropiamos*," as used in the original grant, mean, "to grant and deliver as property."

In the grant it is said, "We have determined to designate the twelve leagues destined for said establishment," &c. The five hundred families are named, "that the said Baron de Bastrop may establish them in the terms, and under the conditions, which are expressed in the said petition and decree." The intent of the grantor in this is plainly signified. The land granted is called the establishment, — the establishment of the Baron de Bastrop, which is destined and appropriated on condition that he shall establish thereon five hundred families, each having four hundred arpents. In the Spanish forms it is still called the establishment, indicating the terms on which it was granted. Under the Spanish laws and usages, the Baron de Bastrop was a *poblador*, meaning "one that peoples."

Under title 12, lib. 4, of the Recopilacion de Indias, there are several books exclusively devoted to colonization. The viceroys exercised the power and discretion of the king in granting lands, &c., and the governors-general, in the absence of the viceroys, exercised the same powers, and afterwards, also, the intendentes. There was no other limitation of this power "than that of not causing injury to third parties."

"If," says the law, "in that part of the Indies already discovered there be any sites or districts so good that it may be expedient to found settlements there, and any persons should apply themselves to making establishments and neighborhoods upon them, that they may do so with better will and greater usefulness, the viceroys and presidents may give them, in our name, lands, lots, and waters, according to the disposition of the land, so that it be not to the prejudice of any third person, and that it be for the time that it may be our will." Temporary grants were subsequently made perpetual.

The tenth law further provides: "Let the lands be divided without excess between discoverers and ancient pobladores and their descendants, who have to remain on the lands; and let the best qualified be preferred; and let them not have power to sell to church or monastery, or other ecclesiastical person."

I may hazard the assertion, without the fear of successful contradiction, that the remuneration given for colonization, in the Spanish colonies, was uniformly a grant of lands. And

these grants were often made in the form of this grant to the Baron de Bastrop. Indeed, the face of the grant seems to me to admit of no other construction. The twelve leagues square were "destined and appropriated," that is, "granted and delivered as property." To whom? Not to the five hundred families only, for their rights are limited to two hundred thousand arpents. It was destined and appropriated for or to the establishment, including the five hundred families and the Baron de Bastrop, the poblador. There is no want of precision in the grant. The rights of the families being limited, the remainder belongs to the Baron de Bastrop, in full property, subject only to the conditions expressed.

This is the result to which I have been brought by a careful investigation of this case. And I am the more confirmed in this opinion, as it concurs with that which has been expressed by three of the most learned and eminent jurisconsults in Spain. J. F. Pacheco, Manuel Cortina, and S. de Olozaga stand in the front rank of Spanish lawyers. Cortina was formerly minister of justice, the other two have both been prime-ministers. I make these statements from the highest authority of Spain in this country.

The opinions referred to are not authenticated so as to make them evidence. But as I have arrived at the same conclusion to which they came on a construction of the grant, I will extract from their opinion one or two sentences. "Destining and appropriating the twelve leagues to the establishment of the Baron de Bastrop, means the delivering them to his proprietorship and dominion, he complying with the conditions with which they were petitioned for and granted." And again: "In it [the grant] are employed the words properly called effective, 'to destine and appropriate,' and the last, especially, as well legally as vulgarly, signifies, 'to make the property of,' so that under whatever aspect the question is looked at, the twelve leagues, by virtue of the said concession, became the property of the Baron, and the property which he acquired in them was the allodial and complete property recognized by our laws, without other trammels than those in the general conditions imposed upon all pobladores and the special ones of this case; and it appears that, if these last were not fully complied with, it was not through the fault of the Baron, but through obstacles opposed to him by the authorities of the colony themselves. His failure of compliance cannot prejudice or diminish in the smallest possible degree the right which, by the concession, he undoubtedly acquired."

In this opinion I have the concurrence of my brother McKinley, whose views are embodied in it with my own.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Louisiana, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the title set up of the petitioners is neither a legal nor equitable claim, and is null and void. Whereupon, it is now here ordered and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby, reversed and annulled, and that this cause be, and the same is hereby, remanded to the said District Court, with directions to dismiss the petition of the claimants.

THE UNITED STATES, APPELLANTS, *v.* LOUISE LIVINGSTON, THE WIDOW AND SOLE EXECUTRIX OF THE LAST WILL AND TESTAMENT OF EDWARD LIVINGSTON, DECEASED, AND CORA LIVINGSTON, THE ONLY CHILD AND FORCED HEIR OF SAID EDWARD LIVINGSTON, AND THE WIFE OF THOMAS BARTON.

THIS was an appeal from the District Court of the United States for the District of Louisiana, and was a claim under the Bastrop grant. It was included in the opinion of the court in the preceding case of the United States *v.* The Cities of Philadelphia and New Orleans, — which see.

THE UNITED STATES, APPELLANTS, *v.* ANN M. CALLENDER, ELIZABETH CALLENDER, CHRISTOPHER G. CALLENDER, AND STANHOPE CALLENDER, OF THE STATE OF NEW YORK, AND FRANCES CALLENDER, THE WIFE OF THOMAS SLIDELL, AND CAROLINE CALLENDER, THE WIFE OF EDWARD OGDEN, OF THE STATE OF LOUISIANA, SAID PERSONS BEING THE WIDOW AND HEIRS OF THE LATE THOMAS CALLENDER; SIDONIA PIERCE LEWIS, WIFE OF PETER K. WAGNER, JOHN LAWSON LEWIS, LOUISA MARIA LEWIS, THEODORE LEWIS, ELIZA CORNELIA LEWIS, ALFRED HAMPDEN LEWIS, ALGERNON SIDNEY LEWIS, GEORGE WASHINGTON LEWIS, BENJAMIN FRANKLIN LEWIS, AND JOSHUA LEWIS, A MINOR, REPRESENTED BY ELIZA MAGIONI, THE WIDOW OF ALFRED JEFFERSON LEWIS, HIS MOTHER AND NATURAL TUTRIX, ALL OF THE STATE OF LOUISIANA; THE SAID PERSONS HEREIN ACTING AS THE HEIRS OF THE LATE JOSHUA LEWIS AND AMERICA LAWSON, HIS WIFE, AND ALSO THE COHEIRS WITH MARY P. BOWMAN OF COLUMBUS LAWSON; MARY P. LAWSON, THE WIFE OF JOHN BOW-

MAN, OF THE STATE OF TENNESSEE, COHEIR WITH THE LAST ABOVE-NAMED PERSONS OF COLUMBUS LAWSON; CATHARINE PAULINE BAKER, THE WIDOW OF BLAIZE CENAS, AND NOW THE WIFE OF WILLIAM CHRISTY, AND HILARY B. CENAS, AUGUSTUS HENRY CENAS, AND AUGUSTUS ST. JOHN, RICHARD BRENEN BLANCHÉ, AND GEORGE CHRISTY, THE LAST FOUR BEING MINORS, AND REPRESENTED BY PAULINE ST. JOHN, THE WIDOW OF PETER CENAS, THEIR MOTHER AND NATURAL TUTRIX, ALL OF THE STATE OF LOUISIANA; JONATHAN MONTGOMERY AND MICHEL MUSSON, THE TESTAMENTARY EXECUTORS OF THE LATE WILLIAM NOTT, OF THE STATE OF LOUISIANA, AND THE HEIRS OF NATHANIEL AMORY, OF THE STATE OF RHODE ISLAND.

THIS, like the two preceding cases, was an appeal from the District Court of the United States for the District of Louisiana, and involved the validity of the Bastrop grant. It was argued together with that of the United States against the Mayor, Aldermen, and Inhabitants of Philadelphia and New Orleans, and was included in the same judgment. See the concluding part of the opinion of the court in the last-named case.

THE UNITED STATES, APPELLANTS, v. SARAH TURNER, THE WIFE OF JARED D. TYLER, WHO IS AUTHORIZED AND ASSISTED HEREIN BY HER SAID HUSBAND; ELIZA TURNER, WIFE OF JOHN A. QUITMAN, WHO IS IN LIKE MANNER AUTHORIZED AND ASSISTED BY HER SAID HUSBAND; HENRY TURNER, AND GEORGE W. TURNER, HEIRS AND LEGAL REPRESENTATIVES OF HENRY TURNER, DECEASED.

The decision of this court in the case of the United States v. King and Coxe (3 Howard, 773, and 7 Howard, 833) again affirmed, viz. that the contract between the Baron de Carondelet and the Marquis de Maison-Rouge conveyed no interest in the land to Maison-Rouge, but was merely intended to mark out by certain and definite boundaries the limits of the establishment which he was authorized to form.

The contract must be judged of according to the laws of Spain; but under those laws, whenever there was an intention to grant private property, words were always used which severed the property from the public domain.

The absence in this case of the royal order of 1795, and of all testimony respecting the genuineness of the certificate of survey by Trudeau, makes no difference in the decision of the court. The construction of the grant was the main point of that case, and is also of this.

Whether or not the instrument was a perfect and complete grant by the laws of Spain, was a question for the court, and not for the jury.

The case of the United States v. King and Coxe explained.

THIS was an appeal from the District Court of the United States for the District Court of Louisiana.

It was a petition filed in the District Court by the appellees, who claimed a tract of land under the Maison-Rouge grant.

The District Court decided in favor of the petitioners, and the United States appealed to this court.

It was submitted by *Mr. Crittenden* (Attorney-General), for the United States, upon the ground that this court had already decided, in the case of United States *v.* King (3 Howard, 773, and 7 Howard, 833), that the grant was invalid.

Mr. Chief Justice TANEY delivered the opinion of the court.

This is an appeal from the decree of the District Court of the United States for the District of Louisiana. The proceedings were instituted by the appellees against the United States, according to the acts of Congress of May 26, 1824, and June 17, 1844; and they claim title to a parcel of land in the State of Louisiana, under an instrument of writing executed by the Baron de Carondelet, on the 20th of June, 1797, in favor of the Marquis de Maison-Rouge. The conveyances by which they deduce title to themselves from him are set forth in the petition. The case turned altogether, in the District Court, upon the construction and effect of the document above mentioned; and this is the only question arising on this appeal.

The appellees insist that this instrument of writing conveyed to the Marquis de Maison-Rouge either the legal or equitable title to the thirty superficial leagues of land described in the plan of Trudeau annexed to the instrument. But the question which they propose to raise has already been decided. The instrument under which they claim title came under the consideration of this court in the case of the United States *v.* King and Coxe, reported in 3 Howard, 773, and 7 Howard, 833. And in the last-mentioned report it will be seen that the construction and effect of this instrument was at that time directly before the court, and the decision of the case depended upon it. The question was then fully and carefully examined and considered, and the court held that this instrument of writing conveyed no interest in the land to Maison-Rouge, as his private property; and that it was intended merely to mark out by certain and definite boundaries the limits of the establishment he was authorized to form, according to the stipulations of a previous contract which he had entered into with the Spanish government, in 1795. And as regarded that previous contract the court said: "It will be observed that this contract contains no stipulation in favor of Maison-Rouge. All the engagements on the part of the government are in favor of the emigrants who should accept the conditions. Indeed, it seems to have been no part of the purposes of this agreement to regulate the compensation which he was to receive for his services. Its only object, as appears by the concluding sentence, was to

make known the offers made by the Spanish government to those who were disposed to come. It was therefore to be shown by the Marquis to those whom he invited to remove to this establishment, and it does not appear to have been thought necessary, and perhaps was not desirable, that his compensation or his interest in forming the colony should be made public. That was a matter between him and the Spanish authorities, which doubtless was understood on both sides. And whether it was to be in money, or in a future grant of land, does not appear. Certainly it was not to be in the land on which this establishment was to be formed, because the government was pledged to grant it to the colonists."

The question which this appeal brings up is therefore *res judicata*. Nor does the court perceive any ground for doubting the correctness of the opinion heretofore pronounced. And in the case arising under the claim of the Baron de Bastrop, in which the judgment of the court has just been delivered, the principles decided in the case of the United States *v.* King and Coxe have again been affirmed, after full argument by counsel and reconsideration by the court. The De Bastrop claim was upon an instrument of writing similar to that in favor of Maison-Rouge, and executed on the same day by the Baron de Carondelet, for a still larger tract of country than that destined and appropriated for the establishment of the Marquis de Maison-Rouge. Undoubtedly the validity and effect of both of these instruments depend altogether upon the laws, ordinances, and usages of the Spanish government, prevailing in the province of Louisiana at the time they were made; and it is the duty of the court to expound them accordingly. And they are both strikingly unlike the grants for colonization authorized by the Laws of the Indies; and equally unlike the grants usually made by the Spanish authorities to persons undertaking to introduce into the province a certain number of colonists. In grants of this description, authorized by the Laws of the Indies and usually made by the provincial authorities, the colonists were introduced by the grantee free of expense to the government, and the grant was the equivalent for the service performed, and depended upon the number thus brought in. And in such cases the intention to grant as private property was always indicated in clear and appropriate words, which severed the land at once from the royal domain, and converted it into private property.

But in the cases of De Bastrop and Maison-Rouge the colonists are to be brought in at the expense of the government itself, and supported for some time afterwards; and they are to receive their grants for the land allotted to them from the

public authorities, and not from De Bastrop or Maison-Rouge. There would seem, therefore, to be no equivalent or consideration for these extensive grants, and certainly there are no words in either of the instruments that indicate an intention to convey to them as private property the land delineated for their respective establishments. On the contrary, as the colonists were to receive their titles and grants from the government, it follows necessarily that the entire title, legal and equitable, must have remained in the government, and have been so understood by the parties. For otherwise this stipulation could not have been performed. And if the land designated for the establishment remained national property, and was not severed by these instruments from the national domain, it passed to the United States as public property by the treaty of cession.

It is true that the contract of 1795, and the royal order which sanctioned it, and which are referred to in the instrument relied on by the petitioners, were not offered in evidence in this case, and are not in the record before us. And in the opinion of the court, reported in 7 Howard, 849, 850, it will be seen that this contract was regarded as furnishing a key to the construction of the instrument subsequently executed. But the court also held that the instrument of 1797, if construed by itself, conveyed to Maison-Rouge no right of property in the land; and, indeed, that it was not intelligible, unless taken in connection with the prior one. The omission, therefore, of the contract and royal order of 1795 in this record, will not distinguish this case from that of the United States *v.* King and Coxe.

It is proper also to say, that a question of fact which was very much discussed when the case of the United States *v.* King and Coxe was first before the court, and upon which the court at that time expressed an opinion, is not in controversy upon the evidence in this record. In the case referred to, a great mass of testimony was offered on behalf of the United States, tending to show that the plan of Trudeau annexed to the instrument of 1797 was not the one to which it intended to refer; that it referred to another, which designated land at a different place, and higher up the Ouachita River; that the survey annexed was not made until the latter end of 1802 or the beginning of 1803, when negotiations were actually pending for the cession of the territory, and was then made in expectation of the cession to the United States, and the certificate antedated to cover the land now claimed.

But as the case of the United States *v.* King and Coxe was an action at law, and brought up to this court by writ of error, the questions of fact arising upon the evidence in the record

were not open to revision in the appellate court. The question above mentioned had been decided against the United States by the District Court, according to the Louisiana practice, without the intervention of a jury, and his decision, like the verdict of a jury, was conclusive as to the fact, where the case was brought up by writ of error. And this court, when their attention was called to the subject, set aside the judgment and reinstated the case, to be heard and determined on the questions of law, assuming the facts to be true as decided by the District Court.

In the present case, however, the proceeding is according to the rules and principles of a court of equity, and the facts as well as the law are brought here for revision by the appeal. The genuineness of the certificate of Trudeau would therefore be open to inquiry, if the evidence in the former case was in this record.

But none of the evidence offered on behalf of the United States, of any description, in the case against King and Coxe, is contained in the record before us. The case appears to have been tried and determined in the District Court altogether upon testimony adduced by the appellees. They examined several witnesses to prove that Trudeau's certificate was genuine, and not antedated. And as there was no opposing evidence, the opinion of the District Court upon this part of the case was undoubtedly correct.

As relates to the order itself of the Baron de Carondelet, to which this plan was annexed, it appears that the original in the Spanish language was produced and proved, and a copy is contained in the record; and with it what purports to be a translation into the English language. By whom this translation was made does not appear; nor does the record show that it was proved by the testimony of any witness. It differs in material respects from that produced in the case of the United States *v.* King and Coxe, which will be found in the report in 3 Howard, and also from that contained in the report of the committee of the House of Representatives in Vol. III. of American State Papers, p. 410 (Public Lands). The two last-mentioned translations are substantially, if not precisely, the same, and conform to the original. But the one sent up in this record is evidently incorrect.

There is likewise a translation set out by the appellees in their petition, differing from the one offered in evidence, and approaching very nearly to the two translations of which we have spoken. But this also is inaccurate, and omits the word "conditions," when speaking of the contract under which Maison-Rouge was to form his establishment. But these

erroneous translations are not entitled to consideration in expounding this instrument, since the original is in evidence and must speak for itself.

Witnesses, it appears, were examined in the District Court, to prove that this instrument was a perfect and complete grant by the laws of Spain then in force in the province of Louisiana in relation to grants of land; and the counsel for the appellees moved for an issue upon this point, to be tried by the jury. This motion was properly refused by the court, and the issues which the court directed were confined to questions of fact. The Spanish laws which formerly prevailed in Louisiana, and upon which the titles to land in that State depend, must be judicially noticed and expounded by the court, like the laws affecting titles to real property in any other State. They are questions of law and not questions of fact, and are always so regarded and treated in the courts of Louisiana. And it can never be maintained in the courts of the United States that the laws of any State of this Union are to be treated as the laws of a foreign nation, and ascertained and determined as a matter of fact, by a jury, upon the testimony of witnesses. And if the Spanish laws prevailing in Louisiana before the cession to the United States were to be regarded as foreign laws, which the courts could not judicially notice, the titles to land in that State would become unstable and insecure; and their validity or invalidity would, in many instances, depend upon the varying opinions of witnesses, and the fluctuating verdicts of juries, deciding upon questions of law which they could not, from the nature of their pursuits and studies, be supposed to comprehend.

The testimony offered on this subject was objected to by the district attorney, but would seem to have been received by the court. It is not material, however, to inquire whether it was received or not. For the only question before us is, whether the instrument of writing of 1797, under which the petitioners claimed title, was or was not correctly expounded by the District Court. And whether he arrived at his conclusion from the language of the instrument itself, or was influenced by the oral testimony, is not important. In either case, the decision that this instrument was a grant to the Marquis de Maison-Rouge of the thirty square leagues of land therein mentioned as his private property, is, in the judgment of this court, erroneous. And as the title of the appellees rests entirely upon this supposed grant, the decree in their favor must be reversed, and the petition dismissed.

Mr. Justice McLEAN, Mr. Justice WAYNE, Mr. Justice McKINLEY, and Mr. Justice GRIER dissented.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Louisiana, and was argued by counsel. On consideration whereof, it is ordered and decreed by this court that the decree of the said District Court in this cause be, and the same is hereby, reversed and annulled, and that this cause be, and the same is hereby, remanded to the said District Court, with directions to dismiss the petition of the claimants.

JOHN H. BENNETT, PLAINTIFF IN ERROR, *v.* SAMUEL F. BUTTERWORTH.

In Texas, the common law has been adopted, but the forms and rules of pleading in common law cases have not; and although the forms of proceedings and practice in the State courts have been adopted in the District Court of the United States, yet such adoption must not be understood as confounding the principles of law and equity; nor as authorizing legal and equitable claims to be blended together in one suit.

The Constitution of the United States has recognized the distinction between law and equity, and it must be observed in the federal courts, although there is no distinction between them by the laws of Texas.

Where a petition was filed claiming certain negroes, to whom the defendant set up a title as being his own property, and the jury brought in a verdict awarding a sum of money to the plaintiff, which was released, and then the court gave judgment that the plaintiff should recover the negroes, these proceedings were irregular, and the judgment must be reversed.

They cannot be assimilated to proceedings in chancery, or treated as such by this court. There is nothing like a bill or answer, as prescribed by the rules of this court, nor any statement of the evidence upon which the judgment could be revised.

The case must, therefore, be considered as a case at law, the rules of which require that the verdict must find the matter in issue between the parties, and the judgment must follow the verdict.

Here neither was the case, and the errors being patent upon the records, the judgment is open to revision in this court, without any motion in arrest of judgment being made or exception taken in the court below.

THIS case was brought up, by writ of error, from the District Court of the United States for the District of Texas.

In 1848, Butterworth filed the following petition against Bennett: —

"To the Honorable J. C. Watrous, Judge of the District Court of the United States for the District of the State of Texas, and which court has also Circuit Court powers.

"The petition of Samuel F. Butterworth, who is a citizen of the State of New York, against John H. Bennett, who is a citizen of the State of Texas, would respectfully represent unto

your honor, that heretofore, viz. on the day of March, 1846, at to wit, in the district aforesaid, he, your petitioner, was lawfully seized and possessed of four negroes, slaves for life, whose names and descriptions are as follows, viz.: Billy, a negro man, of a dark complexion, aged about twelve years, of the value of five hundred dollars; Lindsey, a negro man, of a dark complexion, aged twenty-two years, and of the value of one thousand dollars; Betsy, a mulatto woman, of a light complexion, aged about thirty years, and of the value of eight hundred dollars; and Alexander, a boy of a very light complexion, aged about four years, and of four hundred dollars value, of his own property. And being so possessed, your petitioner, afterwards, to wit, on the day and year aforesaid, in the district aforesaid, casually lost the same out of his possession, and the same, afterwards, to wit, on the day and year aforesaid, in the district aforesaid, came to the possession of the defendant by finding. And your petitioner charges, that the said defendant, well knowing the said negro slaves to be the property of your petitioner, and of right to belong and appertain to him, hath not as yet delivered the above-described negroes, or any or either of them, although often requested so to do, to your petitioner; but hath hitherto wholly refused so to do, and hath detained, and still doth detain, the same from your petitioner, who says he has received damages, by reason of the detention of the slaves aforesaid, of five thousand dollars.

"In consideration of the premises, your petitioner prays your honor to grant him a summons, directed to the marshal of this district, and commanding him to summon the said defendant to be and appear at the next term of this court, to be held for this district, at the city of Galveston, on the first Monday in February next, then and there to answer the allegations contained in this petition; and that, upon the trial of the cause, your petitioner may have a judgment *in specie* for the said negroes, together with damages for the detention of the same, and also the costs of suit; and such other and further relief grant in the premises as shall be in accordance with right and justice; and, as in duty bound, he will ever pray, &c.

"SAMUEL YERGER, *Attorney for Petitioner.*"

To this petition the defendant demurred, pleaded not guilty, and filed two special pleas. The demurrer was afterwards overruled, and the two special pleas stricken out.

In June, 1849, the defendant filed an amended answer, consisting of two special pleas. The second was demurred to by the plaintiff, and the demurrer sustained; so that there remained only the first plea, to which the plaintiff also demurred, but

his demurrer was overruled, and he then replied. The case then went to trial upon this plea and general replication. These pleadings have been stated thus particularly, in order to ascertain what was the issue upon which the parties went to trial.

The plea of the defendant set up a title to the slaves in himself; averring that a dispute had existed between Butterworth and one John D. Amis and one Június Amis, which had been left to arbitration; that the referees had decided, amongst other things, that Butterworth should transfer certain negroes to Amis; that Butterworth delivered the negroes, which were those in question; that Amis sold the negroes to him, Bennett; and the plea concluded in this way:—

"Wherefore the said John H. Bennett says the said four negroes are his property, and not the property of the said Butterworth, and of this he puts himself upon the country."

To this plea Butterworth replied, that all the parties to the submission and decision in the plea set out did not assent and agree to the same, and that Butterworth did not sell, convey, and deliver the negroes in the petition mentioned in compliance with the terms, or any of the terms, of the said decision.

Upon these allegations a jury was sworn, who found the following verdict:—

"We, the jury, find for the plaintiff twelve hundred dollars, the value of the four negro slaves in suit, with six and a quarter cents damages.

"C. C. Herbert, *Foreman.*"

And thereupon the plaintiff, by his attorney, in open court, released the said judgment for twelve hundred dollars as aforesaid. It is therefore considered by the court, that the plaintiff recover of the defendant the negro man Lindsey, the negro woman Betsy and her child, and the negro boy Billy, the negro slaves in the petition of plaintiff mentioned, and also six and a fourth cents, the damages by the jurors aforesaid assessed, and also his costs about his suit in this behalf expended.

And thereafter, to wit, on the 25th day of August, 1849, the following order was made in said suit, to wit:—

"Samuel F. Butterworth *v.* J. H. Bennett.

"On this day came on for hearing, by consent of parties, the motion filed by defendant's counsel, to set aside the verdict, for reasons therein set forth; after argument heard, the court being sufficiently advised, it is ordered that the motion be overruled."

And afterwards, to wit, on the 25th day of August, 1849, the following order was made, to wit:—

"SAMUEL F. BUTTERWORTH *v.* J. H. BENNETT.

"The counsel of defendant in this cause tendered his bill of exception to the opinion of the court herein, which was signed by the judge, and ordered to be filed of record; which bill of exceptions is in the words following, to wit:—

"United States District Court, District of Texas, Spring Term, 1849.

"SAMUEL F. BUTTERWORTH *v.* JOHN H. BENNETT.

"Be it remembered, that on this day, the 25th of August, 1849, the following judgment was rendered in the above-named cause, to wit: On this day came the parties, by their attorneys, and thereupon the demurrer of defendant to plaintiff's petition came on, and was argued, and because it seems to the court that the law is for the plaintiff, it is considered by the court that the demurrer be overruled. And the plaintiff's demurrer to defendant's first and second plea in his amended answer at the present term also came on, and was argued; and because it seems to the court that on the said first plea the law is for the defendant, it is considered by the court that the demurrer to the said first plea be overruled; and the plaintiff thereupon replied to said first plea. And because the law on said second plea is for the plaintiff, it is considered that said demurrer to said plea be sustained.

"And upon motion of plaintiff, by his attorney, it is ordered that the second and third pleas filed in defendant's answer at a former term be stricken out.

"And thereupon came a jury of good and lawful men, to wit, William Alexander, Daniel Marston, Alexander Moore, John Church, William B. Gayle, Elisha B. Cogswell, C. C. Herbert, James G. Sheppard, Ephraim McLean, A. C. Crawford, William G. Davis, and William M. Sergeant, who, being elected, tried, and sworn well and truly to try the issue joined, after some time returned into court the following verdict, to wit: 'We, the jury, find for the plaintiff twelve hundred dollars, the value of the four negro slaves in suit, with six and a quarter cents damages. C. C. Herbert, foreman.' And thereupon the plaintiff, by his attorney, in open court, released the said judgment for twelve hundred dollars, as aforesaid. It is therefore considered by the court, that the plaintiff recover of the defendant the negro man Lindsey, the negro woman Betsy and her child, and the negro boy Billy, the negro slaves in the petition of plaintiff mentioned, and also six and a fourth cents, the damages by the jurors aforesaid assessed, and also his costs about his suit in this behalf expended.

"To the entry of said judgment the defendant objects, on the ground that the same is not in accordance with the verdict of the jury; but the objection was by the court overruled. The said verdict is in words and figures as follows:—'We, the jury, find for the plaintiff twelve hundred dollars, the value of the four negro slaves in the suit, with six and a quarter cents damages.' And the motion of the defendant to set aside said verdict, and for a new trial, having been heard, was by the court overruled. To which opinion of the court, as well in causing said judgment to be sustained as in refusing to set aside said verdict, the defendant excepts, and tenders this his bill of exceptions, which is signed, sealed, and made a part of the record. JOHN C. WATROUS."

Upon this exception, the case came up to this court, and was argued by *Mr. Johnson* and *Mr. Harris*, for the plaintiff in error, and *Mr. Walker* and *Mr. Volney Howard*, for the defendant in error.

The counsel for the plaintiff in error contended,—

I. That the verdict was illegal, and ought to have been set aside.

1. It will be seen, by reference to the plaintiff's petition,—particularly to the prayer thereof,—that this suit was brought for the recovery of the slaves "in specie," (not for the recovery of their value,) and for damages for their unlawful detention. The important issue, viz. whether the right of property was in the plaintiff or the defendant, was, in the verdict of the jury, entirely omitted. See Coffin *v.* Jones, 11 Pick. 45.

2. It did not embrace all the issues, which it should have done. See Crouch *v.* Martin, 3 Blackford, 256; Patterson *v.* U. States, 2 Wheat. 223; Jewett *v.* Davis, 6 N. Hamp. 518.

3. It should have found the value of each of the slaves separately.

II. That the judgment was illegal, because it was not responsive to the verdict.

The counsel for the defendant in error contended, that

This was a suit by petition, under the statute laws of Texas, for four slaves, claimed by plaintiff below, and damages for illegal detention. The suit was for the specific slaves, and not for their value. The issue joined was as to the ownership of the slaves; which issue the jury, in fact, found for the plaintiff. If there be any error in form, it is cured by the verdict, and the amendment laws of Texas. Act of Texas, 1846, p. 202, § 7; p. 365, § 5; p. 392, § 104; p. 393, § 115; pp. 396, 397, §§ 132, 133.

There is no distinction in Texas between courts or suits at law or in equity. In the case of slaves, from their peculiar character as house-servants, or from their necessary connection with plantations, a bill in equity may be filed to compel their delivery. Murphy *v.* Clark, 1 Smedes & Marsh. 221. An action lies in Texas for the specific slaves claimed, in which a statement of the facts by petition is all that is required.

This case is not an action of detinue, but more closely resembles a replevin, which is not confined to cases of distress for rent. 1 Chitty's Plead. 161, 162, 164.

The release of the damages may have deprived the plaintiff of his alternate right to the money, but the waiver of that alternate right could not deprive the plaintiff of his remedy under the judgment for the specific thing.

The error, if any, should have been met by a motion below in arrest of judgment; whereas the motion (under which the exception was taken) was to set aside the verdict, which was substantially a motion for a new trial, the refusal of which furnishes no ground for a writ of error.

The action being by petition, in the nature of a bill in equity, for the specific delivery of the slaves, and the jury having found substantially the right of property to be in the plaintiff, all errors of form may be disregarded, and this court may enter now such judgment as should have been entered in the court below for the plaintiff.

Mr. Chief Justice TANEY delivered the opinion of the court.

This is a writ of error to the District Court of the United States for the District of Texas.

The common law has been adopted in Texas, but the forms and rules of pleading in common law cases have been abolished, and the parties are at liberty to set out their respective claims and defences in any form that will bring them before the court. And as there is no distinction in its courts between cases at law and equity, it has been insisted in this case, on behalf of the defendant in error, that this court may regard the plaintiff's petition either as a declaration at law or as a bill in equity.

Whatever may be the laws of Texas in this respect, they do not govern the proceedings in the courts of the United States. And although the forms of proceedings and practice in the State courts have been adopted in the District Court, yet the adoption of the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. The Constitution of the United States, in creating and defining

the judicial power of the general government, establishes this distinction between law and equity; and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the State court. But if the claim is an equitable one, he must proceed according to rules which this court has prescribed (under the authority of the act of August 23d, 1842), regulating proceedings in equity in the courts of the United States.

There is nothing in these proceedings which resembles a bill or answer in equity according to the rules prescribed by this court, nor any evidence stated upon which a decree in equity could be revised in an appellate court. Nor was any equitable title set up by Butterworth, the plaintiff in the court below. He claimed in his petition a legal title to the negroes, which the defendant denied, insisting that he himself was the legal owner. It was a suit at law to try a legal title.

The defendant (Bennett) in his plea or answer claimed under an award to which Butterworth and a certain Junius Amis and a certain John D. Amis were parties; and averred that, in execution of this award, the said negroes had been delivered by Butterworth to John D. Amis as his property, and by him afterwards transferred to Bennett for a valuable consideration. To this plea Butterworth replied, that all the parties to the submission and decision in the plea set out did not assent and agree to the same, and that Butterworth did not sell, convey, and deliver the negroes in the petition mentioned, in compliance with the terms, or any of the terms, of the said decision. And upon these allegations a jury was sworn, who found for Butterworth (the plaintiff in the court below) in the following words: "We, the jury, find for the plaintiff twelve hundred dollars, the value of the four negro slaves in suit, with six and a quarter cents damages."

And the record proceeds to state, that thereupon the plaintiff (Butterworth), by his attorney, in open court, released the said judgment for $1,200; and thereupon the court adjudged that he recover of the defendant the four negroes mentioned in his petition, and the six and a quarter cents assessed by the jury, and his costs.

It does not appear whether any direction to the jury, as to the law of the case, was asked for by either of the parties, or given by the court; we have nothing but the pleadings, confused and loose as they are, and the verdict and the judgment.

Now if any thing is settled in proceedings at law where a jury is impanelled to try the facts, it is, that the verdict must find the matter in issue between the parties, and the judgment of the court must conform to and follow the verdict.

But here the matter in issue was the property in these negroes, and the verdict does not find that they are the property of the plaintiff or the defendant, but finds for the plaintiff their value, which was not in issue. It ought, therefore, to have been set aside upon the motion of either party, as no judgment could lawfully be entered upon it. It was a verdict for a matter different from that which they were impanelled to try.

In the next place, if any judgment could have been rendered on the verdict, it ought to have been a judgment for the money found by the jury. For the trial of facts by a jury would be of very little value, if, upon a verdict for money to a certain amount, the court could infer that the jury intended to find something else, and give a judgment for property instead of money. And lastly, when the plaintiff, in the District Court, released the $1,200 found by the jury, there was nothing of the verdict remaining, upon which the court could act or give judgment for either party, but the six and a quarter cents damages which the jury found in addition to the value.

The judgment is evidently erroneous, and must be reversed. And as these errors are patent upon the record, they are open to revision here, without any motion in arrest of judgment, or exception taken in the District Court.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Texas, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said District Court, with directions to award a *venire facias de novo.*

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OF THE

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1. Where the United States and the Cherokee nation agreed that the latter should emigrate across the Mississippi, and the former pay the expenses thereof, and the Cherokees undertook to conduct the movement entirely by their own agents, a person whose wagons had been hired could not hold the agent who had hired them personally responsible. The owner of the wagons knew that the agent was a public officer, and dealt with him as such. *Parks* v. *Ross*, 362.
2. Wherever a contract or engagement, made by a public officer, is connected with a subject fairly within the scope of his authority, it shall be considered to have been made officially and in his public character, unless the contrary appears by satisfactory evidence of an absolute and unqualified engagement to be personally liable. *Ibid.*

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BANKRUPTCY.

1. A decree in bankruptcy, passed, in 1843, by the District Court of the United States for the Eastern District of Louisiana, did not pass to the assignee the title to a house and lot in the city of Galveston and State of Texas, which house and lot were the property of the bankrupt. *Oakey* v. *Bennett*, 33.
2. Texas was then a foreign State, and whatever difference of opinion there may be with respect to the extra-territorial operation of a bankrupt law upon personal property, there is none as to its operation upon real estate. This court concurs with Sir William Grant, in 14 Vesey, 537, that the validity of every disposition of real estate must depend upon the law of the country in which that estate is situated. *Ibid.*
3. Besides, the deed made by the assignee in bankruptcy to one of the parties in the present cause was not made conformably with the laws of Texas; and letters of administration upon the estate of the bankrupt had been taken out in Texas before the fact of the bankruptcy was known there; and the creditors of the estate in Texas had a better lien upon the property than the assignee in Louisiana. *Ibid.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See COMMERCIAL LAW.

CHANCERY.

1. Where a deed was executed by an aged woman, the sole surviving executrix of her father, with power under the will to sell, with a view to put an end to a long family litigation in which some judgments had been obtained, and other suits were then existing, and who owned the whole or nearly the whole of the residuary interest of the estate; and the settlement was made with deliberation, and under advice of business friends, and the consideration of the deed

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was a sum of money in hand, with a stipulation on the part of the grantee, that he would pay over any surplus which the lands might yield after paying all reasonable expenses and legal claims, — this deed cannot be set aside on the ground of fraud. *Grats's Executors et al.* v. *Cohen et al.*, 1.
2. The bill below must be dismissed, unless it be so amended as to include all the parties interested, and be confined to a claim for the surplus of the proceeds of the lands, after paying reasonable expenses and legal claims. *Ibid.*
3. Where a bill in chancery alleges that certain lands were entered in the name of a third person, with a view to cover them from the creditors of the person who had entered them, and this allegation is denied in the answer and not sustained by proof, the bill *pro tanto* must be dismissed. *McCoy* v. *Rhodes*, 131.
4. But where the party entered the lands in his own name, and afterwards conveyed them to this third person, but the deed to the third person was not recorded until after a judgment had been obtained by a creditor, and recorded in the parish where the land lies, against the party who made the entry, it will not be sufficient merely to set up in the answer that this third person furnished the money with which to purchase the lands. The equity must be proved. *Ibid.*
5. By the laws of Louisiana, no notarial act concerning immovable property has effect against third persons until it shall have been recorded in the office of the judge of the parish where such property is situated. Therefore, where there was a judgment against the holder of the legal title, rendered in the intermediate time between the execution of a deed and its being recorded, and the judgment was first recorded, the subsequent recording of the deed could not abrogate the lien of the judgment. *Ibid.*
6. The forty-seventh and forty-eighth rules of chancery practice explained. *Ibid.*
7. Under what circumstances a court of equity will hold a purchase from a factor responsible to the principal, see *Warner* v. *Martin*, 209.
8. The Constitution of the United States has recognized the distinction between law and equity; and it must be observed in the federal courts, although there is no distinction between them by the laws of a State. *Bennett* v. *Butterworth*, 669.
9. Where the record does not show that the case was conducted as a chancery case, it cannot be treated as such.

COLLECTORS OF CUSTOMS.
1. Where a collector received treasury-notes in payment for duties, which were cancelled by him, but afterwards stolen or lost, altered, and then received by him again in payment for other duties, he is responsible to the government for the amount thereof. *United States* v. *Morgan*, 154.
2. So also he is responsible, to a certain extent, where treasury-notes were received by him in payment for duties, cancelled, but lost or purloined (without his knowledge or consent), before being placed in the post-office to be returned to the Department. *Ibid.*
3. And this is so, whether the notes be considered as money or only evidences of debt by the Treasury Department. *Ibid.*
4. But the extent, above mentioned, to which his responsibility goes is to be measured by a jury, who are to form their judgment from the danger of the notes getting into circulation again, the delay and inconvenience in obtaining the proper vouchers to settle accounts, the want of evidence at the Department that the notes had been redeemed, or from any other direct consequence of the breach of the collector's bond. *Ibid.*

COMMERCIAL LAW.
1. Where a bill of exchange had upon it the forged indorsement of the payees, but it had been put into circulation by the drawers with such forged indorsement already upon it, and it was purchased in the market by a *bonâ fide* holder, who presented it to the drawee, who accepted and paid it at maturity, and then the drawers failed, the drawee cannot recover back the money which he had paid to the *bonâ fide* holder. *Hortsman* v. *Henshaw*, 177.
2. Where a merchant, in order to secure himself from loss, took merchandise from a factor, with a knowledge that the factor was about to fail, the principal who consigned that merchandise to the factor may avoid the sale, and reclaim his goods, or hold the merchant accountable for them. *Warner* v. *Martin*, 209.

COMMERCIAL LAW (*Continued*).

3. And where the purchase was made from the factor's clerk, who had been left by the factor in charge of the business, this was an additional reason for avoiding the sale; because a factor cannot delegate his authority without the assent of the principal. *Ibid.*
4. A factor or agent, who has power to sell the produce of his principal, has no power to affect the property by tortiously pledging it as a security or satisfaction for a debt of his own, and it is of no consequence that the pledgee is ignorant of the factor's not being the owner. But if the factor has a lien upon the goods he may pledge them to the amount of his lien. *Ibid.*
5. Under any of these irregular transfers, a court of equity will compel the holder to give an account of the property which he holds. *Ibid.*
6. Nor can a factor sell the merchandise of his principal to a creditor of the factor in payment of an antecedent debt. Such a transfer is not a sale in the legal acceptation of that term. *Ibid.*
7. The power of a factor explained. *Ibid.*
8. These principles of the common law are sustained by a statute of the State of New York passed in April, 1830 (3 Revised Laws, Appendix, p. 111). *Ibid.*

CONFLICT OF LAWS.

1. A decree in bankruptcy, passed by the District Court of the United States for the Eastern District of Louisiana, did not pass to the assignee the title to a house and lot in the city of Galveston and State of Texas, which house and lot were the property of the bankrupt. *Oakey* v. *Bennett*, 33.
2. Texas was then a foreign State, and a bankrupt law can have no extra-territorial operation upon real estate. *Ibid.*
3. Besides, the deed made by the assignee in bankruptcy to the claimant was not made conformably with the laws of Texas; and letters of administration upon the estate of the bankrupt had been taken out in Texas before the fact of the bankruptcy was known there; and the creditors of the estate in Texas had a better lien upon the property than the assignee in Louisiana. *Ibid.*
4. By the laws of Louisiana, no notarial act concerning immovable property has effect against third persons, until it shall have been recorded in the office of the judge of the parish where such property is situated. Therefore, where there was a judgment against the holder of the legal title, rendered in the intermediate time between the execution of a deed and its being recorded, and the judgment was first recorded, the subsequent recording of the deed could not abrogate the lien of the judgment. *McCoy* v. *Rhodes*, 131.

CONSTITUTIONAL LAW.

1. A statute of the State of New York provides, that, where joint debtors are sued and one is brought into court on process, if judgment shall pass for plaintiff, he shall have judgment and execution not only against the party brought into court, but also against other joint debtors named in the original process, in the same manner as if they had all been taken and brought into court by virtue of such process; but it shall not be lawful to issue or execute any such execution against the body or against the sole property of any person not brought into court. *D'Arcy* v. *Ketchum*, 165.
2. Where a judgment was given in New York against two partners, one of whom resided in Louisiana and was never served with process, and an action was brought against him in Louisiana upon this judgment, a peremptory exception, in the nature of a demurrer, that "the judgment sued upon is not one upon which suit can be brought against the defendant in this court," was well founded. *Ibid.*,
3. Congress did not intend, by the act of 1790, to declare that a judgment rendered in one State against the person of a citizen of another, who had not been served with process or voluntarily made defence, should have such faith and credit in every other State as it had in the courts of the State in which it was rendered. *Ibid.*
4. Before the admission of Texas into the Union, that State passed many laws upon the subject of head rights to land, the general object of which was to ascertain and secure valid titles, and prevent frauds, by acts of limitation and by the establishment of boards of commissioners to separate the bad from the good titles. *League* v. *De Young et al.*, 185.
5. In the constitution adopted just before her admission into the Union, there was an article annulling fraudulent certificates, and opening the courts, up to a certain day, to suitors for the investigation of their claims. *Ibid.*

CONSTITUTIONAL LAW (*Continued*).
6. It was perfectly competent for the people of Texas to pass these laws and adopt this constitution. *Ibid.*
7. Moreover, they were all passed before the Constitution of the United States had any operation over Texas, and cannot therefore be in conflict with any of its provisions. *Ibid.*
8. The legislature of the Territory of Iowa passed a law directing a court to decide matters of fact without the intervention of a jury. This was inconsistent with the Constitution of the United States. *Webster* v. *Reid*, 437.

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ESTATES TAIL.
1. In 1786 the legislature of New York passed a law declaring that "all estates tail shall be, and hereby are, abolished"; and if any person should thereafter become seized in fee tail of any lands, tenements, or hereditaments by virtue of any devise, &c., he should be deemed to have become seized in fee simple absolute. *Van Rensselaer* v. *Kearney*, 297.
2. This included an estate tail in remainder, as well as one in possession. The courts in New York have so decided, and this court adopts their construction. *Ibid.*
3. The remainder-man dying during the lifetime of the life tenant, the latter, being the father, inherited from the son a fee simple absolute. *Ibid.*
4. Whilst the remainder-man was yet alive, the life tenant sold the property and conveyed it to the vendee by a deed which, according to its true construction, affirmed the existence of an estate in fee simple in itself. The reasons for this construction stated. *Ibid.*
5. Those claiming under him are estopped by this deed. The doctrine of estoppel explained. *Ibid.*

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The doctrine of estoppel explained. *Van Rensselaer* v. *Kearney*, 297.

EVIDENCE.
1. How far the acts of a feme covert amount to an acknowledgment of the construction of the will of her ancestor, see *Weatherhead's Lessee* v. *Baskerville*, 329.
2. Where a will contained the following expressions, viz. "my estate to be equally divided among my children," and also, "my lands and slaves to be equally divided amongst my children"; and had in it also the following clause: "to each of my daughters a small tract of land,"—the last clause must be rejected as void and inoperative, and cannot be used for the purpose of showing such an ambiguity as would let in extrinsic testimony to explain the intentions of the testator. *Ibid.*
3. When such testimony is introduced, it must be of facts unconnected with any general declaration or wishes expressed by a testator for the disposition of his property. *Ibid.*
4. How far acquiescence by a feme covert is evidence of recognition of a construction of a will. *Ibid.*
5. A legal partition cannot be presumed, where such partition is, by law, a matter of record. *Ibid.*
6. The doctrine of presumption as to records explained. *Ibid.*
7. In some of the States it is the practice, after the evidence for the plaintiff is closed, for the defendant to pray the court to instruct the jury that there is no evidence upon which they can find a verdict for the plaintiff. *Parks* v. *Ross*, 362.
8. This is equivalent to a demurrer to the evidence, and such an instruction ought to be given whenever the evidence is not legally sufficient to serve as a foundation of a verdict for the plaintiff. *Ibid.*
9. The act of Congress passed on the 24th of September, 1789 (1 Stat. at Large, 88, 89), provides that *ex parte* depositions may be taken before a judge of a County Court. *Fowler* v. *Merrill*, 375.
10. Where a Probate Court is organized for each county in a State, is a court of record, and has a seal, it is sufficient if a deposition under that act be taken before a judge of the Probate Court. *Ibid.*

EVIDENCE (*Continued.*)

11. A deed made by an officer authorized to sell for taxes, when it shows upon its face that the officer exceeded his authority, is not admissible in evidence. *Moore* v. *Brown*, 414.
12. Where a contractor engaged to build a house for a certain sum of money, and the owner of the house, when sued, offered to prove that there were various omissions in the work stipulated to be done, and portions of the work were done in a defective manner, not being as well done as contracted for, and filed a bill of particulars of these omissions and defects by way of set-off, this evidence was admissible. *Van Buren* v. *Digges*, 461.
13. The old rule, that, where a party shall have been injured, either by a partial failure of consideration for the contract, or by the non-fulfilment of the contract, or by breach of warranty, he must be driven to a cross action, has been much relaxed in later times. The case of Withers *v.* Greene (9 Howard, 213) referred to and reaffirmed. *Ibid.*
14. Where the contract provided that, if the house were not finished by a certain day, a deduction of ten per cent. from the price should be made, and the defendant offered evidence to prove that this forfeiture was intended by the parties as liquidated damages, the evidence was properly rejected. It would have been irregular in the court to go out of the terms of the contract. Unless the forfeiture had been expressly adopted by the parties as the measure of injury or compensation, it would have been irregular to receive the evidence where the inquiry was into the essential justice and fairness of the acts of the parties. *Ibid.*
15. Where the defendant offered to prove that certain work which he, the defendant, had caused to be done by a third person, was usual and proper, and necessary to the completion of the house, this evidence was properly rejected. He should have proved that it came within the contract. So, also, evidence was inadmissible that the defendant, in presence of the plaintiff, insisted upon its being within the contract; for this would have been making the defendant the judge in his own case. *Ibid.*
16. Mere acquiescence by the contractor in the defendant's causing certain work to be done by a third person, will not exclude the contractor from the benefit of having further time allowed to finish the house. It was not necessary for him to make a special agreement that further time should be allowed, in consequence of the delay caused by this extra work. *Ibid.*
17. Where a witness was examined for the plaintiff, and the defendant offered in evidence declarations which he had made of a contradictory character, and then the plaintiff offered to give in evidence others, affirmatory of the first, these last affirmatory declarations were not admissible, being made at a time posterior to that at which he made the contradictory declarations given in evidence by the defendant. *Conrad* v. *Griffey*, 480.

FACTOR.

See Commercial Law.

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JUDGMENT.

1. A statute of the State of New York provides, that, where joint debtors are sued and one is brought into court on process, if judgment shall pass for plaintiff, he shall have judgment and execution not only against the party brought into court, but also against other joint debtors named in the original process, in the same manner as if they had all been taken and brought into court by virtue of such process; but it shall not be lawful to issue or execute any such execution against the body or against the sole property of any person not brought into court. *D'Arcy* v. *Ketchum*, 165.
2. Where a judgment was given in New York against two partners, one of whom resided in Louisiana and was never served with process, and an action was brought against him in Louisiana upon this judgment, a peremptory exception, in the nature of a demurrer, "that the judgment sued upon is not one upon which suit can be brought against the defendant in this court," was well founded. *Ibid.*
3. Congress did not intend, by the act of 1790, to declare that a judgment rendered in one State against the person of a citizen of another, who had not been served with process, or voluntarily made defence, should have such faith and

JUDGMENT (*Continued.*)
credit in every other State as it had in the courts of the State in which it was rendered. *Ibid.*

4. Where there was a judgment which had been recorded under the laws of Louisiana, and thus made equivalent to a mortgage upon the property of the debtor, and the plaintiff assigned this judgment, and was then himself sued and had an execution issued against him, his rights under the recorded judgment could not be sold under this execution, because he had previously transferred all those rights. *Stockton* v. *Ford*, 232.
5. It was not necessary for an assignee of this recorded judgment, who was defending himself in chancery, by claiming under the assignment, to notice in his pleading an allegation in the bill that a release of the judgment was improperly entered upon the record. His assignment was not charged as fraudulent. *Ibid.*
6. The attorney who had recovered the judgment which was thus recovered and assigned, was not at liberty to purchase it when his client became sued and execution was issued against him. *Ibid.*
7. According to the practice in Pennsylvania, where a defendant pleads set-off, the jury are allowed to find in their verdict the amount that the plaintiff is indebted to the defendant, and according to their mode of keeping records this result is entered by way of note; e. g. "new trial refused and judgment on the verdict." *Reeside* v. *Walker*, 272.
8. Although this may be a good record in the courts of Pennsylvania, it does not follow that it is so in the courts of the United States. *Ibid.*
9. The effect of such a judgment, that the plaintiff is indebted to the defendant, is merely to lay the foundation for a *scire facias* to try this new cause of action. *Ibid.*
10. Where the United States were the plaintiffs, and a verdict was rendered that they were indebted to the defendant, and an application was made for a mandamus to compel the Secretary of the Treasury to credit the defendant upon the books of the Treasury with the amount of the verdict, and to pay the same, the mandamus was properly refused by the Circuit Court. For a mandamus will only lie against a ministerial officer to do some ministerial act where the laws require him to do it and he improperly refuses to do so. *Ibid.*
11. Besides, there was no appropriation made by law, and no officer of the government can pay a debt due by the United States without an appropriation by Congress. *Ibid.*
12. To sanction a judgment under a plea of set-off would virtually be allowing the United States to be sued, which the laws do not allow. *Ibid.*
13. It is the uniform practice of the Federal and State courts in Tennessee to test executions as on the first day of the term; and as between creditors, the lien attaches equally to all the judgments entered at the same term. *Clements* v. *Berry*, 398.
14. Where a judgment by default, in an action upon a promissory note, was entered upon the 8th day of the month, but not fully entered up as to the amount due until the 10th, and upon the 10th, a few minutes before the court opened, the debtor recorded a deed of trust conveying away all his property, this deed cannot defeat the lien of the judgment. *Ibid.*
15. The judgment by default created the lien; it was a mere clerical duty to calculate and enter up the amount due. *Ibid.*
16. To note the precise time when deeds are left for record is attended with no difficulty as between deeds; but to settle the exact comparative creation of a lien between a recorded deed and a judgment by a court is attended with much embarrassment. The timepiece of the register cannot settle the validity or invalidity of a judgment lien. *Ibid.*
17. The process act of 1828, passed by Congress, refers to State laws for the creation and effect of liens; but the preparatory steps by which they are created depend upon the rules adopted by the United States courts. *Ibid.*
18. Where the legislature of the Territory of Iowa directed that suits might be instituted against "the owners of the Half-breed lands lying in Lee County," notice thereof being given through the newspapers, and judgments were recovered in suits so instituted, these judgments were nullities. *Webster* v. *Reid*, 437.
19. There was no personal notice to individuals, nor an attachment or other proceeding against the land, until after the judgments. *Ibid.*

JUDGMENT (*Continued*).
20. The law moreover directed that the court should decide without the intervention of a jury to determine matters of fact. This was inconsistent with the Constitution of the United States. *Ibid.*
21. The court below erred in not permitting evidence to be offered to show that the judgments were fraudulent. It erred also in not allowing the defendant to give his title in evidence. *Ibid.*
22. The defendant ought also to have been allowed to give evidence that the judgments had not been obtained in conformity with the law, which required certain preliminary steps to be taken. *Ibid.*
23. The rules of the common law require that the verdict must find the matter in issue between the parties, and the judgment must follow the verdict. If not, the judgment must be reversed. *Bennett* v. *Butterworth*, 669.

JURISDICTION.
1. Where a vessel was libelled in the District Court and sold by agreement of parties, and the proceeds of sale amounted only to $850, which was paid into the registry, this is insufficient to bring the case within the jurisdiction of this court, although an agreement by counsel was filed, admitting the value of the vessel to be more than two thousand dollars. *Gruner* v. *United States*, 163.
2. This agreement would be evidence of the value, if nothing to the contrary appeared in the record. But the decision of the court would only determine the right to the proceeds of sale, viz. $850, and the case must therefore be dismissed, for want of jurisdiction. *Ibid.*
3. By the laws of Mississippi, where a joint action is brought upon a bond or note, the case must be finally disposed of in the court below with respect to all the parties upon the record, before it is carried up to the appellate court; otherwise it is error. *United States* v. *Girault*, 22.
4. Where this error occurs, the practice of this court is to dismiss the case for want of jurisdiction, and remand it to the court below to be proceeded in and finally disposed of. *Ibid.*
5. Where the marshal of the United States had levied an execution upon certain property under a judgment in the Circuit Court, which was taken out of his custody by a writ of replevin issued by a State court, and the Supreme Court of the State decided adversely to the claim of the marshal, it is within the jurisdiction of this court to review that decision. *Clements* v. *Barry*, 398.
6. Where a judgment was rendered by the Supreme Court for Iowa Territory, and the record certified to this court by the Supreme Court of the State of Iowa, after her admission into the Union, and the subject-matter is within the jurisdiction of this court, it will take jurisdiction over the case. *Webster* v. *Reid*, 437.
7. Where the Admiralty Court decreed that a vessel should pay salvage to the amount of one fifth of her value, and that value was shown to be $2,600, an appeal to this court would not lie, for want of jurisdiction. *Spear* v. *Place*, 522.
8. It is the amount of salvage, and not of the vessel, which tests the jurisdiction; the salvage only being in controversy. *Ibid.*
9. The master could not properly represent (without special authority) the consignees of the cargo who had received their respective consignments before the filing of the libel. They lived in the place where the court was held, and ought to have represented their own interests. *Ibid.*
10. The master, therefore, cannot appear for them all conjointly, and in this case the amount of salvage to be paid by the largest consignee would be only $1,136.80. *Ibid.*
11. Neither the salvage upon the vessel or cargo, therefore, is sufficient in amount to bring the case within the jurisdiction of this court. *Ibid.*
12. In 1839 a treaty was made between the United States and Mexico, providing for the "adjustment of claims of citizens of the United States on the Mexican Republic." *Gill* v. *Oliver's Executors*, 529.
13. Under this treaty a sum of money was awarded to be paid to the members of the Baltimore Mexican Company, who had subscribed money to fit out an expedition against Mexico under General Mina, in 1816. *Ibid.*
14. The proceeds of one of the shares of this company were claimed by two parties, one as being the permanent trustee of the insolvent owner of the share,

JURISDICTION (*Continued*).
and the other as being the assignee of the provisional trustee, and afterwards the assignee of the insolvent himself. *Ibid.*
15. The judgment of the Court of Appeals of Maryland, that the latter claimant is entitled to the money, is not reviewable by this court under the twenty-fifth section of the Judiciary Act. *Ibid.*
16. The deeds of conveyance filed as exhibits show the property to have been sold for two thousand dollars, and that it was afterwards converted into a sugar estate. This is sufficient to maintain the jurisdiction of this court. *United States* v. *Hughes*, 552.

JURY.
1. How far the jury are to judge of the responsibility of the collector of the customs for treasury-notes purloined, &c., see *United States* v. *Morgan*, 154.
2. The question whether or not the grant to the Baron de Bastrop was a perfect and complete grant, was one for the court, and not for the jury. *United States* v. *Turner*, 663.

LANDS, PUBLIC.
1. In adjudicating upon an imperfect title under a Spanish concession, this court again adopts the rule laid down in 10 Peters, 350, 331; viz. Can a court of equity, according to its rules and the laws of Spain, consider the conscience of the king so affected by the acts of his lawful authorities in the province, that he became a trustee for the claimant, and held the land claimed by an equity upon it, amounting to a severance of so much from the public domain, before and at the time the country was ceded to the United States? *United States* v. *Boisdoré et al.*, 63.
2. This rule, applied to the following case, brings out the results stated below. *Ibid.*
3. In 1783, in consequence of a memorial from Boisdoré, Miro, the acting Governor of Louisiana, issued the following order to Trudeau, the Surveyor-General, viz.: "Don Carlos Laveau Trudeau will establish Louis Boisdoré upon the extent of ground which he solicits in the preceding memorial, situated in the section of country commonly called Achoucoupoulous, commencing in front from the plantation belonging to Philip Saucier, a resident of said country, down to the bayou called Mosquito Village Bayou, with the depth down to Pearl River; the same being vacant, and no prejudice being caused to the neighbors living as well in front as upon the depth; which measures he will reduce to writing, signing with the aforesaid parties, and will remit the same to me, in order that I may furnish the party interested with a corresponding title in due form." *Ibid.*
4. Boisdoré, in his memorial, had stated that he wished to form an establishment for the whole of his numerous family, on which he might employ all his negroes, and support a large stock of cattle which would be useful to the neighboring city. *Ibid.*
5. The grantee took only a trifling possession of the land, by placing a single slave there, and Trudeau never made, nor attempted to make, a survey. In 1808 the Spanish Governor of Florida gave directions to the Surveyor-General of Florida, who drew a figurative plan of a survey, but the Governor of Florida at that time had no jurisdiction over the land. *Ibid.*
6. If Trudeau had made a survey and returned a certificate, it would have been binding, although it might not have conformed strictly to the lines of the original grant. But the description of the tract is so vague and uncertain, that it cannot now be surveyed by an order of the court. The mode directed by the District Court would include four hundred thousand acres; and it is unreasonable to suppose that the conscience of the king of Spain would have been bound to confirm such a grant, when the grantee neglected to fulfil the obligations which were incumbent upon him. *Ibid.*
7. Besides, there being no given point from which to commence the survey, or to establish the second corner, if the court were to order the mode in which the survey was to be made, it would not be a judicial decree, but an exercise of political jurisdiction. *Ibid.*
8. In 1816 the register and receiver of a land-office, acting under the authority of a law, reported as follows: "We are of opinion that all the claims included under the second species of the first class are already confirmed by the act of Congress of the 12th of April, 1814." *Blanc* v. *Lafayette*, 104.

LANDS, PUBLIC (*Continued*).
9. In 1820 Congress passed an act (3 Stat. at Large, 573) confirming all those claims which were recommended in the report for confirmation. *Ibid.*
10. But where the commissioners erred in placing a claim in the second species of the first class, and erred in supposing that such a claim was already confirmed by the act of 1814, these errors prevent the act of 1820 from confirming the claim. It is consequently invalid. *Ibid.*
11. Where the petition for a Spanish concession was for a tract of land without any definite boundaries, and the petition was referred to the solicitor-general, with instructions to put the petitioner in possession, if in so doing no prejudice would result to third persons, this condition required some subsequent action of the government in order to make the grant absolute. *Lecompte* v. *United States*, 115.
12. A part of the duty of the solicitor-general was to supervise the severance of the object to be granted from the royal domain, and apportion the extent of the grant to the means which the petitioner possessed towards carrying out the objects of the government. *Ibid.*
13. The preceding decisions of this court have established the doctrine, that, in order to constitute a valid grant, there must be a severance of the property claimed from the public domain, either by actual survey or by some ascertained limits or mode of separation recognized by a competent authority. *Ibid.*
14. In the present case, the proof of occupation, settlement, or cultivation is insufficient. *Ibid.*
15. The United States have a right to bring an action of trespass *quare clausum fregit* against a person for cutting and carrying away trees from the public lands. *Cotton* v. *United States*, 229.
16. Where a person entered land according to law, but omitted to obtain a patent for it, and another person afterwards obtained a patent from the United States by proceeding as if it were vacant land, knowing at the same time that it was not vacant, the patent thus obtained will be set aside. *United States* v. *Hughes et al.*, 552.
17. Nor is it a sufficient objection to a decree, that the process was by an information in the nature of a bill in chancery, filed by the attorney for the United States. A simple bill in equity would have been better, but this process being so in substance, the case will not be dismissed for want of form. *Ibid.*
18. An individual owner of land would, in such a case, be entitled to the relief of having the patent set aside; and the United States, as a landholder, must be entitled to the same. *Ibid.*
19. The deeds of conveyance filed as exhibits show the property to have been sold for two thousand dollars, and that it was afterwards converted into a sugar estate. This is sufficient to maintain the jurisdiction of this court *Ibid.*
20. The twelfth section of the regulations of O'Reilly in 1770 required, that there should be an order of survey, a process verbal by the surveyor of the province, three copies of the plat made out by him, one of which should be deposited in the office of the scrivener of the government, and Cabildo, a second delivered to the governor, and the third to the proprietor, to be annexed to the titles of the grant. *United States* v. *Power's Heirs*, 570.
21. Where a grant was alleged to have been issued by the Spanish governor of Louisiana in 1781, and the only evidence of it was a copy taken from a notary's book, the title was invalid. *Ibid.*
22. At the date of the grant, viz. 1st August, 1781, the Spanish governor of Louisiana was only the military commandant of that part of West Florida in which the lands granted were situated. He held the country by right of conquest. The Spanish laws had not been introduced into the country, and it was not ceded to Spain by Great Britain until 1783. The governor had therefore no authority to grant land in 1781. *Ibid.*
23. Under the acts of Congress of 1824 and 1844, the District Court had no power to act upon evidence of mere naked possession, unaccompanied by written evidence, conferring, or professing to confer, a title of some description. *Ibid.*
24. Under the various acts of Congress relating to land titles in that tract of country between the Iberville, the Perdido, and the thirty-first degree of north latitude, a complete title, unrecorded, is not barred against the United States, although it is barred against any private claim derived from the United States. *Ibid.*

LANDS, PUBLIC (*Continued*).

25. The decision of this court in the United States *v.* Reynes (9 Howard, 127), again affirmed, to wit, that under the acts of Congress of May 26, 1824 (4 Stat. at Large, 52), and June 17, 1844 (5 Stat. at Large, 676), the courts of the United States have no power to decide upon complete or perfect titles to land. *United States* v. *Philadelphia and New Orleans*, 609.
26. The contract made between the Baron de Bastrop and the Spanish government did not vest a perfect title in Bastrop, and therefore this court can exercise jurisdiction over the claim. *Ibid.*
27. The grant of twelve leagues square, given to Bastrop by the Spanish governor, only pointed out the place where the families were to settle which Bastrop was to bring in. The land was destined and appropriated to this purpose. There were to be five hundred families, who were to grow wheat, and Bastrop's interest was intended to be in the monopoly of manufacturing flour and exporting it to Havana and other places under the jurisdiction of the Spanish crown. With this view, he obtained separate grants for the bayous or mill-seats, and was bound to erect at least one mill within two years from the date of the grant. *Ibid.*
28. The families which were introduced took their titles from the Spanish government, and not from Bastrop. *Ibid.*
29. This case stands upon the same ground as the case of the United States *v.* King et al., 7 Howard, 833. *Ibid.*
30. The decision of this court in the case of the United States *v.* King and Coxe (3 Howard, 773, and 7 Howard, 833) again affirmed, viz. that the contract between the Baron de Carondelet and the Marquis de Maison-Rouge conveyed no interest in the land to Maison-Rouge, but was merely intended to mark out by certain and definite boundaries the limits of the establishment which he was authorized to form. *United States* v. *Turner*, 663.
31. The contract must be judged of according to the laws of Spain; but under those laws, whenever there was an intention to grant private property, words were always used which severed the property from the public domain. *Ibid.*
32. The absence in this case of the royal order of 1795, and of all testimony respecting the genuineness of the certificate of survey by Trudeau, makes no difference in the decision of the court. The construction of the grant was the main point of that case, and is also of this. *Ibid.*
33. Whether or not the instrument was a perfect and complete grant by the laws of Spain, was a question for the court, and not for the jury. *Ibid.*
34. The case of the United States *v.* King and Coxe explained. *Ibid.*

LEX LOCI.

See Conflict of Laws. Constitutional Law.

LIMITATION OF ACTIONS, AND STATUTE OF.

1. Where the Circuit Court instructed the jury, that they might consider the acts of one of the daughters and her husband, in acquiescing in a partition and in receiving a small tract of land, as a recognition of the true construction of a will to be, that the daughters were not entitled to an equal share, the acts of partition being accompanied by long adverse possession, say thirty or forty years, this instruction was erroneous. The daughter was a minor when she married, and continued covert until within a short time before she brought the suit. No presumption, arising from her acts, could therefore be made against her. *Weatherhead's Lessee* v. *Baskerville*, 330.
2. And a recognition by her, when freed from coverture, of a sale which she had made in conjunction with her husband, amounted to no more than a ratification of that particular sale. *Ibid.*
3. According to the statute of limitations passed by the State of Illinois, a defendant in ejectment who had been in possession of the land by actual residence thereon, having a connected title in law or equity deducible of record from the State or the United States, or from any public officer or other person authorized by the laws of the State to sell such land for the non-payment of taxes, &c., might defend himself by pleading that he had been in possession as aforesaid for seven years. *Moore* v. *Brown*, 414.
4. But where a defendant offered a deed in evidence, purporting to be a deed from an officer authorized to sell for taxes, and the deed upon its face showed that the officer had not complied with the requisitions of the statute, this was a void deed, made in violation of law, and did not bring the defendant within the benefit of the statute of limitations. *Ibid.*

LIMITATION OF ACTIONS, AND STATUTE OF (*Continued*).

5. He must have a connected title from some one authorized to sell, and in this case the officer was not so authorized. The deed was not, therefore, admissible in evidence. *Ibid.*
6. An agreement by a debtor to apply a certain portion of his crops towards the extinguishment of the debt in consideration of further indulgence, will take a case out of the statute of limitations, and may be set up in avoidance of the plea by way of estoppel upon the debtor. *Randon* v. *Toby*, 493.
7. The defendant is not at liberty to complain that the construction of this instrument was left to the jury, because it was so done at his own request, and because, if the court had construed it, the construction must have been unfavorable to the defendant. *Ibid.*

MANDAMUS.

Where the United States were the plaintiffs, and a verdict was rendered, according to the practice in Pennsylvania, that they were indebted to the defendant, and an application was made for a mandamus to compel the Secretary of the Treasury to credit the defendant upon the books of the Treasury with the amount of the verdict and to pay the same, the mandamus was properly refused by the Circuit Court. *Reeside* v. *Walker*, 272.

MORTGAGE.

1. Although the day when a mortgage was executed was not stated, yet where it bore a date in its commencement, and its acknowledgment and date of record were both given, and both of them preceded a sheriff's sale of the mortgaged property, it was certain that the mortgage was executed before the sale under execution. *Fowler* v. *Merrill*, 375.
2. Although, when the mortgage was recorded, the laws of the State did not make the mere recording convey the title when the personal property thus mortgaged remained in the possession of the mortgagor, yet they sanctioned the mortgage unless it was made without good consideration, and opposed by a *bonâ fide* subsequent purchaser, who had no notice of its existence. *Ibid.*
3. But the fact of recording the mortgage tended to give notice of its existence, and in the present case the evidence shows that the purchasers at the sheriff's sale had notice of the mortgage. *Ibid.*
4. Such purchasers must allege that their want of notice continued up to the time of making actual payment; a want of notice merely extending to the time of making the purchase is not enough. Payment might have been refused, and then they would not have been injured. *Ibid.*
5. Moreover, between the time when the mortgage was in fact recorded and the time of the sheriff's sale, the State passed a law making such recorded mortgages valid. *Ibid.*
6. The increase or offspring of slaves belong to the owner of the mother. *Ibid.*
7. The decree of the Circuit Court being that the purchasers at the sheriff's sale should either surrender the property to the prior mortgagee, or pay the value thereof, such value was properly computed as it was at the time of rendering the decree. *Ibid.*
8. The hire of the slaves was properly charged as commencing when the prior mortgagee filed his bill for a foreclosure. *Ibid.*

NEUTRALS, RIGHTS OF.

1. A neutral leaving a belligerent country, in which he was domiciled at the commencement of the war, is entitled to the rights of a neutral in his person and property, as soon as he sails from the hostile port. *United States* v. *Guillem*, 47.
2. The property he takes with him is not liable to condemnation for a breach of blockade by the vessel in which he embarks, when entering or departing from the port, unless he knew of the intention of the vessel to break it in going out. *Ibid.*

PATENT RIGHTS.

1. A patent granted for a "new and useful improvement in making door and other knobs, of all kinds of clay used in pottery, and of porcelain," by having the "cavity in which the screw or shank is inserted by which they are fastened largest at the bottom of its depth, in form of a dovetail, and a screw formed therein by pouring in metal in a fused state," was invalid. *Hotchkiss* v. *Greenwood*, 248.
2. The invention claimed in the schedule was manufacturing knobs as above de-

PATENT RIGHTS (*Continued*).

scribed, of potter's clay, or any kind of clay used in pottery, and shaped and finished by moulding, turning, burning, and glazing; and also of porcelain. *Ibid.*

3. The knob was not knew, nor the metallic shank and spindle, nor the dovetail form of the cavity in the knob, nor the means by which the metallic shank was securely fastened therein. Knobs had also been used made of clay. *Ibid.*
4. The only thing new was the substitution of a knob made out of clay in that peculiar form for a knob of metal or wood. This might have been a better or cheaper article, but is not the subject of a patent. *Ibid.*
5. The test was, that, if no more ingenuity and skill was necessary to construct the new knob than was possessed by an ordinary mechanic acquainted with the business, the patent was void; and this was a proper question for the jury. *Ibid.*
6. The decision of this court in the case of Hogg et al. *v.* Emerson, 6 Howard, 437, reviewed and affirmed. *Hogg et al.* v. *Emerson*, 587.
7. The specification of Emerson's patent "for certain improvements in the steam-engine and in the mode of propelling therewith either vessels on the water or carriages on the land," constituted a part of the patent, and must be construed with it. Anterior to 1836; the law did not imperatively require that the specification be made a part of the patent, but the inventor had a right to advise the Commissioner of Patents to make the specification a part of the patent, and it was peculiarly proper that he should comply with the request. *Ibid.*
8. This court again decides, that the patent is sufficiently clear and certain, and does not cover more ground than one patent may cover. Only one is necessary for two kindred and auxiliary inventions. *Ibid.*
9. The drawings which accompany the specification may be referred to for illustration. Within what time drawings ought to have been replaced, after the destruction of the Patent-Office by fire, so as to avoid the imputation of negligence or of a design to mislead the public, was a question which was properly left to the jury. *Ibid.*
10. The principles stated, within whose operation a jury can properly act in assessing damages against the maker of a patented machine. *Ibid.*

PLEAS AND PLEADINGS.

1. Where an action was brought by the United States upon the official bond of a receiver of public money, a plea that the United States had accepted another bond from the receiver was bad. The new bond could be no satisfaction for the damages that had accrued for the breach of the condition of the old one. *United States* v. *Girault* 22.
2. Pleas, also, were bad, alleging that the receiver had made returns to the Treasury Department, admitting that he had received money which the pleas asserted that he never had received. They were bad, because they addressed themselves entirely to the evidence, which, it was supposed, the United States would bring forward upon the trial. *Ibid.*
3. Besides, these pleas were bad, because the sureties in the bond were bound to protect the United States from the commission of the very fraud which they attempted to set up as a defence. *Ibid.*
4. The case of the United States *v.* Boyd, 5 Howard, 29, examined. *Ibid.*
5. Another plea taking issue upon the breach should not have been demurred to. The demurrer being general as to all the pleas, and bad as to this one, judgment was properly given against the plaintiffs in the court below. *Ibid.*
6. By the laws of Mississippi, where a joint action is brought upon a bond or note, the case must be finally disposed of in the court below, with respect to all the parties upon the record, before it is carried up to the appellate court, otherwise it is error. *Ibid.*
7. Where this error occurs, the practice of this court is to dismiss the case for want of jurisdiction, and remand it to the court below to be proceeded in and finally disposed of. *Ibid.*
8. Where a creditor brought an action against an executrix in the Circuit Court of the United States for Louisiana, and the petition only averred that the petitioner was shown to be a creditor by the accounts in the State court which had jurisdiction over the estates of deceased persons, and then proceeded to charge the executrix with a devastavit, and exceptions were taken to the petition as insufficient, these exceptions must be sustained. *McGill* v. *Armour*, 142.

PLEAS AND PLEADINGS (*Continued*).

9. The petition should have gone on to allege further proceedings in the State court analogous to a judgment at common law, as a foundation of a claim for a judgment against the *executrix de bonis propriis*, suggesting a devastavit *Ibid.*
10. The laws of Louisiana provide for compelling the executrix to file a tableau of distribution, which is a necessary and preliminary step towards holding the executrix personally responsible. The petition, not having averred this, was defective, and the exceptions must be sustained. *Ibid.*
11. Under what circumstances an assignee of a judgment, defending himself in chancery, need not notice an allegation in the bill that a release of the judgment was improperly entered upon the record. *Stockton* v. *Ford*, 232.
12. The bankruptcy of the plaintiff prior to the time when he took the notes payable to himself was no legal defence to the action. He was one of the persons authorized to settle up the insolvent estate, and whether or not he accounted to his creditors for the proceeds was no question between him and the maker of the notes. *Randon* v. *Toby*, 493.
13. The plea that the notes were given for African negroes imported into Texas after 1833 was no legal defence. The creditor had no connection with the person who introduced the negroes contrary to law. If the negroes had been declared to be free, the consideration of the notes would have failed; but the debtor still held them as slaves, and therefore received the full consideration for his notes. *Ibid.*

PRACTICE.

1. By the laws of Mississippi, where a joint action is brought upon a bond or note, the case must be finally disposed of in the court below, with respect to all the parties upon the record, before it is carried up to the appellate court, otherwise it is error. *United States* v. *Girault*, 22.
2. Where this error occurs, the practice of this court is to dismiss the case for want of jurisdiction, and remand it to the court below to be proceeded in and finally disposed of. *Ibid.*
3. Although a bill of exceptions is imperfectly drawn, yet if this court can ascertain the substance of the facts, and the questions on which the judge instructed the jury are apparent, it will proceed to decide the case. *United States* v. *Morgan*, 154.
4. Where a case is brought up by an appeal from a judgment on the common law side of the Circuit Court, instead of by a writ of error, it must be dismissed. *Bevins* v. *Ramsey*, 185.
5. Where a judgment was rendered on the 25th of October, 1843, and a writ of error allowed on the 19th of October, 1848, but not issued and filed until the 4th of November following, more than five years had elapsed after rendering the judgment, and the writ of error may be dismissed on motion. *Brooks* v. *Norris*, 204.
6. It is the filing of the writ which removes the record from the inferior to the appellate court; and the day on which the writ may have been issued by the clerk, or the day on which it is tested, are not material in deciding the question. *Ibid.*
7. By the English practice, this error must be taken advantage of by plea; but according to the practice of this court, a party may avail himself, by motion, of any defect which appears upon the record itself. *Ibid.*
8. According to the practice in Pennsylvania, where a defendant pleads set-off, the jury are allowed to find in their verdict the amount that the plaintiff is indebted to the defendant, and according to their mode of keeping records this result is entered by way of note; e. g. "new trial refused and judgment on the verdict." *Reeside* v. *Walker*, 272.
9. Although this may be a good record in the courts of Pennsylvania, it does not follow that it is so in the courts of the United States. *Ibid.*
10. Where the United States are plaintiffs, they are not bound by such a verdict. *Ibid.*
11. A motion on the part of the defendants in error for a rule upon the plaintiff in error to file a copy of the record, overruled. *Boyd* v. *Scott*, 292.
12. A bill by the State of Florida against the State of Georgia ordered to be filed, and process of subpœna directed to be issued against the State of Georgia. *Florida* v. *Georgia*, 293.

PRACTICE (*Continued*).

13. A writ of error abated where the death of the plaintiff in error was suggested, and leave granted to make proper parties at December term, 1846, representatives not yet having been made. *Phillips* v. *Preston*, 294.
14. Where a case was dismissed by this court for want of a citation, and the plaintiff in error sued out another writ, and applied to this court for a supersedeas to stay execution in the court below, the application cannot be granted. *Hogan* v. *Ross*, 294.
15. This court is not authorized to grant a supersedeas unless the writ of error has been sued out within ten days after the rendition of the judgment, and in conformity with the provisions of the twenty-third section of the act of 1789. *Ibid.*
16. The cases of Stockton and Moore *v.* Bishop (2 Howard, 74) and Hardeman *v.* Anderson (4 Howard, 640) explained. *Ibid.*
17. In some of the States it is the practice, after the evidence for the plaintiff is closed, for the defendant to pray the court to instruct the jury that there is no evidence upon which they can find a verdict for the plaintiff. This is equivalent to a demurrer to the evidence, and such an instruction ought to be given whenever the evidence is not legally sufficient to serve as a foundation of a verdict for the plaintiff. *Parks* v. *Ross*, 362.
18. Where the writ, pleadings, and contract spoke only of Frederic D. Conrad, and the judgment went against Daniel Frederic Conrad, the defendant, it was too late after verdict and judgment to assign the variation as error. *Conrad* v. *Griffey*, 480.
19. A day assigned for the argument, at the next term, of a cause upon the original docket of this court. *Pennsylvania* v. *Wheeling and Belmont Bridge Company*, 528.
20. The fifty-fourth rule of this court, requiring an appearance to be entered on or before the second day of the term next succeeding that at which the case is docketed, does not include an adjourned term; but applies only to regular terms. *Larman* v. *Tisdale's Heirs*, 586.
21. In Texas, the common law has been adopted, but the forms and rules of pleading in common law cases have not; and although the forms of proceedings and practice in the State courts have been adopted in the District Court of the United States, yet such adoption must not be understood as confounding the principles of law and equity; nor as authorizing legal and equitable claims to be blended together in one suit. *Bennett* v. *Butterworth*, 669.
22. The Constitution of the United States has recognized the distinction between law and equity, and it must be observed in the federal courts, although there is no distinction between them by the laws of Texas. *Ibid.*
23. Where a petition was filed claiming certain negroes to whom the defendant set up a title as being his own property, and the jury brought in a verdict awarding a sum of money to the plaintiff, which was released, and then the court gave judgment that the plaintiff should recover the negroes, these proceedings were irregular, and the judgment must be reversed. *Ibid.*
24. They cannot be assimilated to proceedings in chancery, or treated as such by this court. There is nothing like a bill or answer as prescribed by the rules of this court, nor any statement of the evidence upon which the judgment could be revised. *Ibid.*
25. The case must, therefore, be considered as a case at law, the rules of which require that the verdict must find the matter in issue between the parties, and the judgment must follow the verdict. *Ibid.*
26. Here neither was the case, and the error being patent upon the records, the judgment is open to revision in this court without any motion in arrest of judgment being made or exception taken in the court below. *Ibid.*

PRESUMPTIVE EVIDENCE.
See EVIDENCE.

PRIZE.
See NEUTRALS, RIGHTS OF.

SLAVES.

1. The increase or offspring of slaves belong to the owner of the mother. *Fowler* v. *Merrill*, 375
2. The hire of slaves was properly charged as commencing when the prior mortgagee filed his bill for a foreclosure. *Ibid.*

TREASURY-NOTES.

1. Where a collector received treasury-notes in payment for duties, which were cancelled by him, but afterwards stolen or lost, altered, and then received by him again in payment for other duties, he is responsible to the government for the amount thereof. *United States* v. *Morgan*, 154.
2. So, also, he is responsible, to a certain extent, where treasury-notes were received by him in payment for duties, cancelled, but lost or purloined (without his knowledge or consent) before being placed in the post-office to be returned to the Department. *Ibid.*
3. And this is so, whether the notes be considered as money or only evidences of debt by the Treasury Department. *Ibid.*
4. But the extent, above mentioned, to which his responsibility goes, is to be measured by a jury, who are to form their judgment from the danger of the notes getting into circulation again, the delay and inconvenience in obtaining the proper vouchers to settle accounts, the want of evidence at the Department that the notes had been redeemed, or from any other direct consequence of the breach of the collector's bond. *Ibid.*

WILLS.

1. Where a will contained the following expressions: "my estate to be equally divided amongst my children," and also, "my lands and slaves to be equally divided amongst my children"; and had in it also the following clause: "to each of my daughters a small tract of land," — the last clause must be rejected as void and inoperative, and cannot be used for the purpose of showing such an ambiguity as would let in extrinsic testimony to explain the intentions of the testator. *Weatherhead's Lessee* v. *Baskerville*, 330.
2. When such testimony is introduced, it must be of facts unconnected with any general declaration or wishes expressed by a testator for the disposition of his property. In the present case, the testimony offered purported to express those wishes, and was therefore inadmissible. *Ibid.*
3. Where the Circuit Court instructed the jury that they might consider the acts of one of the daughters and her husband, in acquiescing in a partition, and in receiving "a small tract of land," as a recognition of the true construction of the will to be, that the daughters were not entitled to an equal share, the acts of partition being accompanied by long adverse possession, say thirty or forty years, this instruction was erroneous. The daughter was a minor when she married, and continued covert until within a short time before she brought the suit. No presumption, arising from her acts, could therefore be made against her. *Ibid.*
4. And a recognition by her, when freed from coverture, of a sale which she had made in conjunction with her husband, amounted to no more than a ratification of that particular sale. *Ibid.*
5. So, also, an instruction was erroneous, that the jury might presume from the evidence that there had been a legal partition of the testator's land in respect to his daughters, by order of a court, when the executor assigned to them certain parts of it. By the laws of the State where the lands were, such a partition was a judicial act, and became a record. *Ibid.*
6. The doctrine of presumption as to records, or proving their existence *aliunde*, explained. *Ibid.*
7. In the present case, the proof is that the partition was not made by the order of a court. *Ibid.*

WRITS OF ERROR.

Where a case is brought up by an appeal from a judgment on the common law side of the Circuit Court, instead of by a writ of error, it must be dismissed. *Bevins* v. *Ramsey*, 185.

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